CLERK'S COPY

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 535

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 29, 1940

CERTIORARI GRANTED DECEMBER 9, 1940

BLANK PAGE

# United States Circuit Court of Appeals

EIGHTH CIRCUIT.

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**No. 11,300**

CIVIL.

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UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

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**No. 11,301**

CIVIL.

---

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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FILED OCTOBER 21, 1939.

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[fol. 1]. (Petition in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)

(Lock and Dam No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

To The Honorable, The District Court Above Named:

Your Petitioner, The United States Of America, in its sovereign capacity, hereby respectfully petitions your Honorable Court and alleges:

I.

That this proceeding is brought and instituted in its name and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, and A. C. Wiprud and John J. Courtney, Special Assistants to the Attorney General, acting under instructions of your Petitioner's Attorney General and at the request and direction of your Petitioner's Secretary of War thereunto duly authorized by Acts of Congress of the United States, among those Acts being these hereinafter specifically referred to.

[fol. 2] II.

Your Petitioner further states that under and pursuant to an Act of Congress of the United States of America, approved April 24, 1888, entitled "An Act to Facilitate the Prosecution of Works Projected for Improvement of Rivers and Harbors," and an Act of Congress approved August 1, 1888, entitled "An Act to Authorize Condemnation of Lands for Sites for Public Buildings and other Purposes", also Act of Congress approved July 18, 1918, entitled "An Act Making Appropriation for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and an Act of Congress approved July 3, 1930, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and Joint Resolution of Congress (Public Resolution No. 10-72d Congress, H. J. Res. 271) "Amending section 1 of the Act entitled 'An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes', approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis", approved February 24, 1932, and divers other Acts of Congress, your Petitioner's Secretary of War is authorized and directed to create a nine foot channel in the Mississippi River between the mouth of the Illinois River and the Twin City dam and to that end to construct, maintain and operate certain locks and dams.

III.

That your Petitioner's Secretary of War has heretofore acquired certain lands for the construction, maintenance and operation of a lock and dam in the Mississippi River in the vicinity of Minneiska, Winona County, Minnesota, commonly known and designated as Lock and Dam No. 5, extending across the Mississippi River; but other lands are required for that purpose and it is necessary that your Petitioner take, appropriate and condemn the lands described in the list marked Exhibit "A", which is hereto attached and hereby made a part hereof. That a map is [fol. 3] hereto attached marked Exhibit "C" and hereby made a part hereof, on which is shown the lands which are necessary and which your Petitioner desires to take, ap-

propriate and condemn, tinted in blue on said map; and the lands which your Petitioner desires to take, appropriate and condemn easements in, on and over for the full, complete and perpetual right, power and privilege to overflow are described at the bottom of page 5 of said Exhibit "A", and your Petitioner requires the right, power and privilege to cut, remove and dispose of all wood, timber and other natural and artificial projections or obstructions on said lands or in the slack-water pool to be created by said lock and dam or on the margin thereof, which in any way or at any time shall interfere with navigation or the use of the lands and pool for the maintenance and operation of said lock and dam, or tend to render said lock and dam or the pool created thereby inaccessible, unsafe or insanitary, together with the right to enter upon said lands from time to time, as occasion may require, for any of the purposes aforesaid.

IV.

That the said Secretary of War has made due effort to acquire by purchase from the persons owning, occupying, claiming or appearing by the public records or otherwise to have some right, title or interest in or to the several tracts or parcels of land herein described but has not been able to agree with said persons or some of them as to the purchase price thereof, and in cases where an agreement as to purchase price might or could be arrived at, the titles to such tracts are so defective as to require a condemnation proceeding to bring in all parties and persons unknown and obtain a good title to such tracts.

V.

That under and pursuant to an Act of Congress approved July 18, 1918, entitled "An Act making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for other Purposes", the said Secretary of War is authorized to take immediate possession of said lands and desires to take immediate possession, so that the work of construction may [fol. 4] be immediately proceeded with; that your Petitioner has commenced such construction.

VI.

That certain and adequate appropriations and provisions for just compensation for the lands herein sought to be

taken for the purposes aforesaid have been made, by an allotment and appropriation under the National Industrial Recovery Act approved June 16, 1933 (Public No. 67-73d Congress, H. R. 5755) and money for such compensation is now available.

VII.

That said lands are a part of the area to be overflowed when said lock and dam No. 5 shall be placed in operation. That pursuant to the objects, purposes and intent of the National Industrial Recovery Act approved June 16, 1933, it is [indispensible] for your Petitioner to have possession of said lands in order that they may be cleared and made suitable for flowage resulting from said dam and in order that immediate employment may be given and the distress and depression of unemployment relieved, all of which is in furtherance of the purposes of said act and the policy of your Petitioner.

VIII.

That the names of all persons shown by the public records or claiming to be the owners, or occupants of said lands, or claiming or known to your Petitioner to have any right, title, equity or interest therein, as near as Petitioner can ascertain are as shown by the list hereto attached and hereby made a part hereof marked Exhibit "B".

IX.

That your Petitioner by naming herein any person or persons as owners or otherwise interested does not admit or intend to admit that any person or persons so named have any right, title, estate or interest in or to the bed of the Mississippi River below ordinary high water mark, or the meander line, as against your Petitioner in the improvement of the navigation of said river.

[fol. 5] Wherefor Your Petitioner Prays for an Order and Decree of This Court:

1. That the use for said lands sought to be acquired herein is a public use;

2. That it is necessary for such use, to take, appropriate and condemn said lands and easements in lands.

3. That the Petitioner be given the right to take immediate possession thereof;

4. That three qualified, competent and disinterested persons be appointed as Commissioners to appraise the damages occasioned by such taking, appropriating and condemning, according to law.

5. That the time and place of the first meeting of said Commissioners be fixed and their compensation prescribed.

6. That the Court make such other orders and decrees and take such other action as may be necessary and proper fully to effect the objects and purposes of your Petitioner, that just compensation may be made to those entitled thereto by law for the aforesaid taking and appropriating.

7. That the Court grant such other and further relief to your Petitioner as the nature of the case may require and reserve the right to make all such further and other orders in the premises as may be proper.

THE UNITED STATES OF AMERICA,
By Geo. F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to the Attorney General.
216 Federal Building,
St. Paul, Minnesota.

[fol. 6] State of Minnesota,
County of Ramsey—ss.:

John J. Courtney, being duly sworn, says that he is a Special Assistant to the Attorney General for the United States of America; that the foregoing Petition is true of his own knowledge except those matters therein stated on information and belief and as to those he believes it to be true.

JOHN J. COURTNEY.

Subscribed and sworn to before me this 30th day of December, 1933.

(Seal) FLORENCE WILSON,
Notary Public, Ramsey County, Minn.

My Commission expires April 16, 1938.

[fol. 7] Exhibit "A".

Lock and Dam No. 5, Mississippi River

Acquisition of Lands and Flowage Easements

Description of Tracts

In

Winona County, Minnesota.

* * * * * * * *

[fol. 8] Chicago, Milwaukee, St. Paul & Pacific Railroad Co.
(right-of-way)

The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul and Pacific Railroad right-of-way up to an elevation of 663 feet above mean sea level datum (1912 adjustment) as said right-of-way is now laid out and operated over, across and through the following parcels of land, viz.:

| | 5th P. M. |
|---|---|
| Lot 4 | Sec. 17, T. 108 N., R. 8 W. |
| Lot 1 | Sec. 18, T. 108 N., R. 8 W. |
| Lots 1, 2 & 3 | Sec. 7, T. 108 N., R. 8 W. |
| Lots 1, & 2 | Sec. 12, T. 108 N., R. 9 W. |
| Lots 1, 2 & 3 | Sec. 1, T. 108 N., R. 9 W. |
| Lot 1 | Sec. 2, T. 108 N., R. 9 W. |

* * * * * * * *

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[fol. 9] Exhibit "B".

Persons Owning, Occupying, Claiming or Appearing by the Public Records or Otherwise to Have Some Right, Title or Interest in or to the Lands in Winona County, Minnesota, Described in Exhibit "A":

(L/D #5, Second Condemnation, Winona County, Minnesota)

As To
Tracts:

* * * * * * * *

[fol. 10] Wi-Easements:

As to Railroad Property:

Chicago, Milwaukee & St. Paul Railway Company;

Chicago, Milwaukee, St. Paul and Pacific Railway Company;

United States Trust Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, as trustee under that certain trust deed dated May 1, 1889;

United States Mortgage and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and Calvert Brewer, as trustees of record under that certain trust deed or mortgage dated February 2, 1925;

Chemical Bank and Trust Company, a New York corporation
and
Howard B. Smith, of Montclair, New Jersey, as successor trustees under that certain trust deed or mortgage dated February 2, 1925;

Guaranty Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York,
and
Merrel P. Callaway, as trustees under that certain trust deed or mortgage dated February 2, 1925;

The National City Bank of New York, a national banking association organized and existing under and by virtue of the laws of the United States of America,
and
William W. Hoffman, of New York City, New York, as trustees under that certain mortgage or trust deed dated February 2, 1925.

(Endorsed—Petition 459) Filed December 30, 1933. Margaret L. Mullane, Clerk.

[fol. 11] (Petition in Case No. 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)

(Lock and Dam No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 461. vs. At Law.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

To The Honorable, The District Court Above Named:

Your Petitioner, The United States of America, in its sovereign capacity, hereby respectfully petitions your Honorable Court and alleges:

I.

That this proceeding is brought and instituted in its name and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, and A. C. Wiprud and John J. Courtney, Special Assistants to the Attorney General, acting under instructions of your Petitioner's Attorney General and at the request and direction of your Petitioner's Secretary of War thereunto duly authorized by Acts of Congress of the United States, among those Acts being those hereinafter specifically referred to.

II.

Your Petitioner further states that under and pursuant to an Act of Congress of the United States of America, approved April 24, 1888, entitled "An Act to Facilitate the Prosecution of Works Projected for Improvement of Rivers and Harbors", and an Act of Congress approved

August 1, 1888, entitled "An Act to Authorize Condemnation of Lands for Sites for Public Buildings and other [fol. 12] Purposes"; also Act of Congress approved July 18, 1918, entitled "An Act Making Appropriation for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and an Act of Congess approved July 3, 1930, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes", and Joint Resolution of Congress (Public Resolution No. 10-72d Congress, H. J. Res. 271) "Amending Section 1 of the Act entitled 'An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes', approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis", approved February 24, 1932, and divers other Acts of Congress, your Petitioner's Secretary of War is authorized and directed to create a nine-foot channel in the Mississippi River between the mouth of the Iilinois River and The Twin City dam and to that end to construct, maintain and operate certain locks and dams.

III.

That your Petitioner's Secretary of War has heretofore acquired certain lands for the construction, maintenance and operation of a lock and dam in the Mississippi River in the vicinity of Minneiska, Minnesota, commonly known and designated as Lock and Dam No. 5, extending across the Mississippi River; but other lands are required for that purpose and it is necessary that your Petitioner take, appropriate and condemn the lands described in the list marked Exhibit "A", which is hereto attached and hereby made a part hereof. That it is likewise necessary that your Petitioner take, appropriate and condemn easements in lands described in said Exhibit "A", on pages 9, 10 and 11, consisting of the full, complete and perpetual right, power and privilege to overflow the same up to an elevation of 663 feet above mean sea level datum, as more particularly described in said Exhibit "A", together with the right, power and privilege to cut, remove and dispose of all wood, timber and other natural and artificial projections or ob-

structions on said lands, or in the slack-water pool to be created by said lock and dam or on the margin thereof, which in any way or at any time shall interfere with navigation or the use of the lands and pool for the maintenance and operation of said lock and dam, or tend to render said [fol. 13] lock and dam or the pool created thereby, inaccessible, unsafe or insanitary, together with the right to enter upon said lands from time to time, as occasion may require for any of the purposes aforesaid.

IV.

That the said Secretary of War has made due effort to acquire by purchase from the persons owning, occupying, claiming or appearing by the public records or otherwise to have some right, title or interest in or to the several tracts or parcels of land herein described but has not been able to agree with said persons or some of them as to the purchase price thereof, and in cases where an agreement as to the purchase price might or could be arrived at, the titles to such tracts are so defective as to require a condemnation proceeding to bring in all parties and persons unknown and obtain a good title to such tracts.

V.

That under and pursuant to an Act of Congress approved July 18, 1918, entitled "An Act making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for other Purposes", the said Secretary of War is authorized to take immediate possession of said lands and desires so to do, so that the work of construction may be proceeded with that your Petitioner has commenced such construction.

VI.

That certain and adequate appropriation and provision for just compensation for the lands herein sought to be taken for the purposes aforesaid has been made, by an allotment and appropriation under the National Industrial Recovery Act approved June 16, 1933—(Public No. 67-73d Congress, H. R. 5755) and money for such compensation is now available.

VII.

That said lands are a part of the area to be overflowed when said Lock and Dam No. 5 shall be placed in operation. That pursuant to the objects, purposes and intent of the National Industrial Recovery Act approved June 16, 1933, it is [indispensible] for your Petitioner to have possession of said lands in order that they may be cleared and made suitable for flowage resulting from said dam and in order that immediate employment may be given and the distress and depression of unemployment relieved, all of [fol. 14] which is in furtherance of the purposes of said act and the policy of your Petitioner.

VIII.

That the names of all persons shown by the public records or claiming to be the owners, or occupants of said lands, or claiming or known to your Petitioner to have any right, title, equity or interest therein, or in some part thereof, as near as Petitioner can ascertain are as shown on schedule attached and hereby made a part hereof marked Exhibit "B".

IX.

That hereto attached and hereby made a part hereof are two maps of the area to be affected by the operation of said Lock and Dam No. 5. That the lands which it is necessary for your Petitioner to take, appropriate and condemn, as aforesaid, are shown tinted in blue on said maps. That the easements which it is necessary for your Petitioner to take, appropriate and condemn, as aforesaid, are outlined in red on said maps. All of said lands and easements in lands are more particularly described in said Exhibit "A".

X.

That your Petitioner by naming herein any person or persons as owners or otherwise interested does not admit or intend to admit that any person or persons so named have any right, title, estate or interest in or to the bed of the Mississippi River below ordinary high water mark, or the meander line, as against your Petitioner in the improvement of the navigation of said river.

Wherefor Your Petitioner Prays for an Order and Decree of This Court:

1. That the use for said lands sought to be acquired herein is a public use;

2. That it is necessary for such use, to take, appropriate and condemn said lands and easements in lands.

3. That the Petitioner be given the right to take immediate possession thereof;

4 That three qualified, competent and disinterested persons be appointed as Commissioners to appraise the damages occasioned by such taking, appropriating and condemning according to law.

5. That the time and place of the first meeting of said Commissioners be fixed and their compensation prescribed.

[fol. 15] 6. That the Court make such other orders and decrees and take such other action as may be necessary and proper fully to effect the objects and purposes of your Petitioner, that just compensation may be made to those entitled thereto by law for the aforesaid taking and appropriating;

7. That the Court grant such other and further relief to your Petitioner as the nature of the case may require and reserve the right to make all such further and other orders in the premises as may be proper.

THE UNITED STATES OF AMERICA,
By Geo. F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to the Attorney General,
216 Federal Building,
St. Paul, Minnesota.

[fol. 16] State of Minnesota,
County of Ramsey—ss.

John J. Courtney, being duly sworn, says that he is a Special Assistant to the Attorney General for the United States of America; that the foregoing Petition is true of his own knowledge except as to those matters therein

stated on information and belief and as to those matters he believes it to be true.

JOHN J. COURTNEY.

Subscribed and sworn to before me this 30 day of December, 1933.

(Notarial Seal) FLORENCE WILSON,
Notary Public, Ramsey County, Minn.

My commission expires April 16, 1938.

---

[fol. 17] Exhibit "A".

Lock and Dam No. 5, Mississippi River

Wabasha County, Minnesota

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

(right-of-way)

The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul and Pacific Railroad Company right-of-way, up to an elevation of 663 feet above mean sea level datum (1912 adjustment), as said right-of-way is laid out and operated over, across and through the following parcels of land, viz.:

| | 5th P. M. |
|---|---|
| Lot 1 | Sec. 35, T. 109 N., R. 9 W. |
| SW¼ of the NW¼, Lots 3, 4 and 5 | Sec. 34, T. 109 N., R. 9 W. |
| SE¼ of the NE¼, SW¼ of the NE¼, SE¼ of the NW¼, SW¼ of the NW¼ and NW¼ of the NW¼ | Sec. 33, T. 109 N., R. 9 W. |
| NE¼ of the NE¼, NW¼ of the NE¼ and NE¼ of the NW¼ | Sec. 32, T. 109 N., R. 9 W. |
| SE¼ of the SW¼, NE¼ of the SW¼ and NW¼ of the SW¼ | Sec. 29, T. 109 N., R. 9 W. |
| NW¼ of the NW¼ | Sec. 29, T. 109 N., R. 9 W. |
| NE¼ of the NE¼ | Sec. 30, T. 109 N., R. 9 W. |
| SE¼ of the SE¼ and SW¼ of the SE¼ | Sec. 19, T. 109 N., R. 9 W. |

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Exhibit "B".

Lock and Dam No. 5, Mississippi River

Wabasha County, Minnesota

Wa- Easements:

As to Railroad Rights-of-Way:

Chicago, Milwaukee & St. Paul Railway Company;

Chicago, Milwaukee, St. Paul & Pacific Railway Company:

United States Trust Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, as trustee, under that certain trust deed dated May 1, 1889;

United States Mortgage and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and Calvert Brewer, as trustees of record under that certain trust deed or mortgage dated February 2, 1925;

Chemical Bank and Trust Company, a New York corporation
and
Howard B. Smith, of Montclair, New Jersey, as successor trustees under that certain trust deed or mortgage dated February 2, 1925;

Guaranty Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York,
and
Merrel P. Callaway, as trustees under that certain trust [fol. 18] deed or mortgage dated February 2, 1925;

The National City Bank of New York, a national banking association organized and existing under and by virtue of the laws of the United States of America,
and
William W. Hoffman, of New York City, New York, as trustees under that certain mortgage or trust deed dated February 2, 1925.

(Endorsed—Petition 461) Filed December 30, 1933. Margaret L. Mullane, Clerk.

[fol. 19] (Order Amending Petition in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Lands Situate Along the Mississippi River in the County of Winona, State of Minnesota, which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

On motion of the Petitioner made in open Court, and upon all the files, records and proceedings herein,

It Is Hereby Ordered that the Petition heretofore filed herein may be and it is hereby amended in the following particulars, to-wit:—by deleting, wheresoever the same appears on page 5 of Exhibit "A", attached to the Petition herein, the figures "663" and by inserting in lieu and in place thereof the figures "660", as the same relates to the elevation above mean sea level datum (1912 adjustment), of the easements sought on the rights-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and over the highway of the State of Minnesota, so that the [fol. 20] easements sought in this proceeding shall be to an elevation of 660 feet above mean sea level datum (1912 ad-

justment) over said easements, and each of them, instead of to an elevation of 663 feet.

Dated this 28th day of February, 1934.

MATTHEW M. JOYCE,
Judge.

(Endorsed—Order Amending Petition 459) Filed February 28, 1934. Margaret L. Mullane, Clerk. By Joseph T. Lynch, Deputy.

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[fol. 21] (Order Amending Petition in Case No. 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)
(L/D No. 5—Minneiska)

File No. 461 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River in the County of Wabasha, State of Minnesota, which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

On motion of the Petitioner made in open Court, and upon all the files, records and proceedings herein,

It Is Hereby Ordered that the Petition heretofore filed herein may be and it is hereby amended in the following particulars, to-wit:—by deleting, wheresoever the same appear on pages 9, 10, and 11 of Exhibit "A", attached to the Petition, and substituting in lieu and in place thereof the figures "660", as the same relate to the elevation above mean sea level datum (1912 adjustment), of the easements sought in and over the rights-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Highway of the State of Minnesota, the Sand Prairie Road, the West Newton Chute Road, the streets, alleys and levees in the Village of Minneiska, Minnesota, and the streets and alleys in the Village of Weaver, Minnesota, so that the easements sought in this proceeding shall be to an elevation of 660 feet above mean sea level datum (1912 adjustment) over said easements, and each of them, instead of to an elevation of 663 feet.

Dated this 28th day of February, 1934.

MATTHEW M. JOYCE, Judge.

[fol. 22] (Endorsed—Order Amending Petition 461) Filed February 28, 1934, Margaret L. Mullane, Clerk. By Joseph T. Lynch, Deputy.

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[fol. 23] (Order Granting Condemnation and Appointing Commissioners in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 acres; the State of Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River, in the County of Winona, State of Minnesota, Which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above named Court, at the Federal Court House, in the City of St. Paul, Minnesota, on Tuesday, February 27, 1934, pursuant to Notice of Presentation of Petition for the taking, appropriating and condemning of the lands therein described for public use in the improvement of navigation in the Mississippi River, on account of the construction, maintenance and operation of a lock and dam to be constructed in the Mississippi River in Winona County, to be commonly known and designated as Lock and Dam No. 5, and for an order appointing three Commissioners to appraise, ascertain and report the damages that may be caused to or sustained by the respective owners by or on account of the taking and condemning of said land.

[fol. 24] George F. Sullivan, United States Attorney for the District of Minnesota, Daniel F. Steck and John J. Courtney, Special Assistants to the Attorney General, appeared for the Petitioner. On behalf of the respondents the following appearances were made, viz.:—A. C. Erdall, on behalf of the Chicago, Milwaukee & St. Paul Railway; L. M. Montgomery, attorney pro se; and J. C. Carley, on behalf of Bottsford and Bauman.

It Appearing to the Court that said proceeding to condemn was duly brought and was authorized by the Congress of the United States as set out in said Petition; that the Petition herein was filed in the office of the Clerk of Court December 30, 1933; that notice of time and place of

presentation and hearing has been duly given and served on all parties interested in said lands and in this proceeding as by law directed, reference being made to the Return of the Marshal heretofore filed herein, and

The Court having heard the evidence adduced by the Petitioner in support of said Petition and duly considered the same, upon said evidence and upon all the files, records and proceedings in said matter, Finds:

That the use for which said lands described in said Petition are sought to be acquired herein is a public use, to-wit; the improvement of navigation in the Mississippi River; that the taking, appropriating and condemning thereof is necessary for such use and is authorized by law; that the possession of said lands is necessary and advantageous to the Petitioner for such use, and that certain and adequate provision has been made by the Petitioner for the compensation to be made for the property taken; Now Therefore,

It Is Hereby Ordered that the lands described in said Petition are hereby taken, appropriated and condemned for public use in the improvement of navigation on the Mississippi River; that fee simple title thereto is vested in the United States of America and that immediate possession [fol. 25] of said lands may be granted to the Petitioner herein upon petition therefor, notice whereof shall be served personally by mail at least eight (8) days in advance of the hearing on said application, and, upon those who cannot be found, by publication once in the America Herold at least eight (8) days in advance of said hearing.

It Is Hereby Further Ordered that the following named persons whose addresses are given below and who are competent, disinterested and qualified according to law be and hereby are appointed Commissioners to ascertain and report the compensation to be made by Petitioner for the lands so taken, appropriated and condemned, to the respective owners, occupants and persons having any interest in said lands, and to make report of the respective awards for said parcels to this Court, viz.:

P. H. Harrington Address Minneapolis, Minnesota

Harry D. Smith Address Plainview, Minnesota

J. L. Gangnagel. Address Wabasha, Minnesota

It Is Hereby Further Ordered that said Commissioners shall hold their first meeting at the hour of 10:00 A. M. on the 18 day of April, 1934, in the City of Wabasha, Wabasha County, Minnesota, and that after taking and subscribing the oath of office required by law, they immediately proceed to perform their duties as such Commissioners herein.

It Is Hereby Further Ordered that the compensation of said Commissioners be and is hereby fixed at the sum of. ($24.00) Dollars per day for each Commissioner while actually engaged in the performance of his duties under this Order.

MATTHEW M. JOYCE,
United States District Judge.

Dated this 13th day of April, 1934.

[fol. 26] (Endorsed—Order Granting Condemnation and Appointing Commissioners 459) Filed April 14, 1934, Margaret L. Mullane, Clerk, By Joseph T. Lynch, Deputy.

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[fol. 27] (Order Granting Condemnation and Appointing Commissioners in Case No. 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Mimesota,
Petitioner,
File No. 461. vs. At Law.
Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al., Respondents.

In the Matter of

The Condemnation of Certain Land Situate Along the Mississippi River, in the County of Wabasha, State of Minnesota, Which Land is Necessary and Advantageous to the Construction, Maintenance and Operation of Lock and Dam No. 5, Required for the Improving of Navigation in the Mississippi River.

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above named Court, at the Federal Court House, in the City of St. Paul, Minnesota, on Tuesday, February 27, 1934, pursuant to Notice of Presentation of Petition for the taking, appropriating and condemning of the lands therein described for public use in the improvement of navigation on the Mississippi River, on account of the construction, maintenance and operation of a lock and dam to be constructed in the Mississippi River in Wabasha County, to be commonly known and desigated as Lock and Dam No. 5, and for an order appointing three Commissioners to appraise, ascertain and report the damages that may be caused to or sustained by the respective owners by or on account of the taking and condemning of said land.

George F. Sullivan, United States Attorney for the District of Minnesota, and John J. Courtney, Special Assistant to the Attorney General, appeared for the Petitioner. [fol. 28] On behalf of the respondents the following appearances were made, viz.:—A. C. Erdall, on behalf of Chicago, Milwaukee & St. Paul Railway; L. M. Montgomery, attorney pro se; J. C. Carley, on behalf of Bottsford and Bauman.

It Appearing to the Court that said proceeding to condemn was duly brought and was authorized by the Congress of the United States as set out in said Petition; that the Petition herein was filed in the office of the Clerk of Court December 30, 1933; that notice of time and place of presentation and hearing has been duly given and served on all parties interested in said lands and in this proceeding as by law directed, reference being made to the Return of the Marshal heretofore filed herein, and,

The Court having heard the evidence adduced by the Petitioner in support of said Petition and duly considered the same, upon said evidence and upon all the files, records and proceedings in said matter Finds:

That the use for which said lands described in said Petition are sought to be acquired herein is a public use to-wit:—the improvement of navigation in the Mississippi River; that the taking, appropriating and condemning thereof is necessary for such use and is authorized by law; that the possession of said lands is necessary and advantageous to the Petitioner for such use; and that certain and adequate provision has been made by the Petitioner for the compensation to be made for the property taken; Now Therefore,

It Is Hereby Ordered That the lands described in said Petition are hereby taken, appropriated and condemned for public use in the improvement of navigation on the Mississippi River; that fee simple title thereto is vested in the United States of America and that immediate possession of said lands may be granted to the Petitioner herein upon petition therefor, notice whereof shall be served personally, by mail at least eight (8) days in advance of the hearing on said application, and, upon those who cannot be found, by publication once in the Wabasha County Herald-Standard at least eight (8) days in advance of said hearing.

It Is Hereby Further Ordered that the following named persons whose addresses are given below and who are competent, disinterested and qualified according to law be and hereby are appointed Commissioners to ascertain and re-
[fol. 28a] port the compensation to be made by Petitioner for the lands so taken, appropriated and condemned, to the respective owners, occupants and persons having any interest in said lands, and to make report of the respective awards for said parcels to this Court, viz.:

| | | |
|---|---|---|
| P. H. Harrington | Address | Minneapolis, Minnesota |
| Harry D. Smith | " | Plainview, Minnesota |
| J. L. Gangnagel | " | Wabasha, Minnesota |

It Is Hereby Further Ordered that said Commissioners shall hold their first meeting at the hour of 10:00 A. M. on the 18th day of April, 1934, in the City of Wabasha, Wa-

basha County, Minnesota, and that after taking and subscribing the oath of office required by law, they immediately proceed to perform their duties as such Commissioners herein.

It Is Hereby Ordered that the compensation of said Commissioners be and is hereby fixed at the sum of ($24.00) Dollars per day for each Commissioner while actually engaged in the performance of his duties under this Order.

MATTHEW M. JOYCE,
United States District Judge.

Dated this 13 day of April, 1934.

(Endorsed—Order Granting Condemnation and Appointing Commissioners 461) Filed April 14, 1934. Margaret L. Mullane, Clerk, Joseph T. Lynch, Deputy.

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[fol. 29] (Order Granting United States Immediate Possession of Lands Described in Petition in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)

(L/D No. 5 Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain land in Winona County, Minnesota, containing 32 Acres; the State of Minnesota, et al., Respondents.

The above matter came duly on for hearing before this Court on Saturday, July 28, 1934, upon the petition of the United States of America for an order granting it immediate possession of the lands and easements described in the petition on file herein.

The Petitioner appeared by John J. Courtney, Special Assistant to the Attorney General.

Upon said petition and upon all the files, records and proceedings herein, and after hearing the evidence adduced by the Petitioner, it appearing that certain and adequate provision has been made for the payment of just compensation to the parties entitled thereto for the taking of said lands, and that the relief prayed for should be granted in the public interest,

It Is Ordered that the United States of America, Petitioner herein, be and it is hereby granted immediate possession of the lands and easements in lands described in the petition for condemnation herein and all thereof and it may take and go into immediate possession thereof accordingly.

It Is Further Ordered that the Petitioner herein, in the exercise of the right of immediate possession herein granted, for the purpose of clearing timber upon said land, [fol. 30] shall not interfere with growing crops of any of the respondents until the same shall have been harvested.

It Is Further Ordered and directed that the work done by the Petitioner herein, in the exercise of its right to possession, shall so conduct its operations as not to interfere with fences or gates or otherwise disturb the use of the lands for farming purposes during the agricultural season of 1934 to any greater extent than may be reasonably necessary for the execution of the work sought to be done by the United States of America in aid of navigation on the lands and easements in lands herein referred to.

Dated this 4th day of August, 1934.

MATTHEW M. JOYCE,
United States District Judge.

(Endorsed—Order for Immediate Possession 459) Filed August 4, 1934, Margaret L. Mullane, Clerk, By William H. Eckley, Deputy.

[fol. 31] (Order Granting United States Immediate Possession of Lands Described in Petition in Case No. 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 Acres)

(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 461. vs. At law.

Certain land in Wabasha County, Minnesota, containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minnesota, et al, Respondents.

The above matter came duly on for hearing before this Court on Saturday, July 28, 1934, upon the petition of the United States of America for an order granting it immediate possession of the lands and easements described in the petition on file herein.

The Petitioner appeared by John J. Courtney, Special Assistant to the Attorney General.

Upon said petition and upon all the files, records and proceedings herein, and after hearing the evidence adduced by the Petitioner, it appearing that certain and adequate provision has been made for the payment of just compensation to the parties entitled thereto for the taking of said lands, and that the relief prayed for should be granted in the public interest,

It Is Ordered that the United States of America, Petitioner herein, be and it is hereby granted immediate possession of the lands and easements in lands described in the petition for condemnation herein and all thereof and it may take and go into immediate possession thereof accordingly.

It Is Further Ordered that the Petitioner herein, in the exercise of the right of immediate possession herein granted, for the purpose of clearing timber upon said land, shall not interfere with growing crops of any of the respondents until the same shall have been harvested.

[fol. 32] It Is Further Ordered and directed that the work done by the Petitioner herein, in the exercise of its right to possession, shall so conduct its operations as not to interfere with fences or gates or otherwise disturb the use of the lands for farming purposes during the agricultural season of 1934 to any greater extent than may be reasonably necessary for the execution of the work sought to be done by the United States of America in aid of navigation on the lands and easements in lands herein referred to.

Dated this 4th day of August, 1934.

MATTHEW M. JOYCE,
United States District Judge.

(Endorsed—Order for Immediate Possession 461) Filed August 4, 1934, Margaret L. Mullane, Clerk, By William H. Eckley, Deputy.

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[fol. 33] (Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter particularly described, Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation)
(L/D No. 5-Minneiska)

File No. 459 At Law.

We, the undersigned, Commissioners appointed by the Court in this proceeding to ascertain and report the amount of damages sustained and the compensation due the owners

and persons interested in the tracts of land taken and condemned in this proceeding, and upon which land easements are being taken, do hereby report as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al. for the taking, appropriation and condemnation by the petitioner of the easement hereinafter described and as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company for the taking, appropriation and condemnation by the petitioner herein of the easements hereinafter described as follows:

We met at the time and place designated in the order of appointment, took and subscribed the oath of office and filed the same with the Clerk of the Court. P. H. Harrington was elected chairman and Harry D. Smith was elected secretary. The hearing on the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the joint claim of said Railroad Company and Western Union Telegraph and Cable Company was conducted separately from the hearings of other owners named in this condemnation proceeding. John J. Courtney, Special Assistant to the Attorney General, appeared on behalf of the petitioner and A. C. Erdall appeared on behalf of the said Railroad Company and said Telegraph Company.

[fol. 34] At our first meeting we fixed the time and place for viewing the premises and did view the premises with the representatives of each of the parties and of the petitioner.

We fixed the time and place for hearing the testimony of all of the parties interested and heard all the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner.

Now, therefore, having taken the oath, viewed the premises and heard the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner and having received the instructions of the Court and after listening to the arguments of counsel and having in all respects fully complied with the order of the Court and the law relating to this proceeding, we do hereby make and report our

award as to the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the sum of One Hundred Sixty-one Thousand One Hundred Thirty-Four and 23/100 ($161,134.23) Dollars, for the taking of an easement in and over the right of way and interests of said Railroad Company as the same is laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein and to and including a point within the limits of Winona County, Minnesota, which, by stipulation of the parties, is agreed to be a point on said right of way numbered railroad station 4818+45 and Government station 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

It was stipulated between the parties, and is so stipulated in this Report and Award, that the award to said Western Union Telegraph and Cable Company shall be and it hereby is merged in the claim of said Railroad Company for signal and telegraph lines and changes claimed to be necessary therein and that the award for such signal and tele-[fol. 35] graph changes shall be and it hereby is made jointly to said Railroad Company and the said Telegraph Company and that the said Railroad Company and Telegraph Company, after the making of such award, will make any necessary allocation or adjustments of amounts among themselves.

Upon such stipulation and upon the same showing as hereinbefore recited, we do hereby make and report and award jointly to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company in the sum of Seven Thousand One Hundred Forty-four and 06/100 ($7,144.06) Dollars, for the taking of an easement as described in the petition for condemnation herein in and over the right of way and interests of said Railroad Company as laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein, that is to say in Law Number 459 and to and including a point within the limits of Winona County, Minnesota, which by stipulation of the parties is agreed to be a point on said right of way railroad station numbered 4818+45 and Government sta-

tion 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

In arriving at the aforesaid award in favor of the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company, we allowed for the respective items of claim the amount set opposite each item thereof as follows:

| | |
|---|---|
| Item No. 1 — For riprap within the area not claimed by the Government to be an encroachment. | ($71,533.00) |
| Item No. 2 — For bank widening within the area not claimed by the Government to be an encroachment. | ($ None ) |
| Item No. 3 — For raise in grade for the area not claimed by the Government to be an encroachment. | ($ 235.00) |
| Item No. 4 — For culvert L-583. | ($ None ) |
| [fol. 36] Item No. 5 — For culvert L-567. | ($ 285.00) |
| Item No. 6 — Culvert L-565. | ($ 24.00) |
| Item No. 7 — Culvert L-551. | ($ 38.00) |
| Item No. 8 — Culvert L-549. | ($ None ) |
| Item No. 9 — Culvert L-82½. | ($ 70.00) |
| Item No. 10 — Culvert L-545½. | ($ None ) |
| Item No. 11 — For Bridge L-82. | ($12,650.00) |
| Item No. 12 — For engineering and contingencies upon items numbered 1 to 11 inclusive above. | ($ None ) |
| Item No. 13 — For riprap within the 660 lineal feet of railroad between government stations 15+70 to 20+30 and/or railroad stations 4989+06.5 to 4982+56.5, claimed by the Government to be an encroachment. | ($11,166.26) |
| Item No. 14 — For culvert L-527, situate within the limits of the stations described in Item No. 13 above and claimed by the Government to be an encroachment. | ($ 3,383.00) |

| | | |
|---|---|---|
| Item No. 15 — | For engineering and contingencies upon Items numbered 13 and 14 above. | ($ 338.30) |
| Item No. 16 — | For riprap in the 1900 lineal feet claimed by the Government to be an encroachment between Government stations 36+50 to 55+50 and/or railroad stations 4968+36.5 to 4949+36.5. | ($26,947.45) |
| Item No. 17 — | For bank widening within the area described at Item No. 16 above. | ($ 1,824.50) |
| Item No. 18 — | For raise in grade within the area described in Item No. 16 above. | ($ 5,463.90) |
| Item No. 19 — | For culvert L-80, situate within the limits of the stations recited in Item No. 16 above, and claimed by the Government to be an encroachment. | ($20,777.00) |
| Item No. 20 — | For engineering and contingencies upon Items No. 16, 17, 18 and 19, above. | ($ 2,806.55) |
| Item No. 21 — | For riprap between Government stations 70+80W to 74+30W, and/or railroad station 4930+36.5 to railroad station 4934+06.5, claimed by the Government to be an encroachment. (consisting of 350 lineal feet. | ($ 1,887.05) |
| Item No. 22 — | For bank widening between the stations described in Item No. 21 above. | ($ 423.10) |

[fol. 37]

| | | |
|---|---|---|
| Item No. 23 — | For raise in grade between the stations described in Item No. 21 above. | ($ 1,127.10) |
| Item No. 24 — | For engineering and contingencies upon Item No. 21 and 22 and 23 above. | ($ 155.02) |
| | Total | $161,134.23 |

In arriving at the aforesaid joint award of the Chicago Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company on account of signal and telegraph changes claimed to be necessary, we allowed for the respective items of claim on the part of said Railroad Company and Telegraph Company the amount set opposite each item, as follows:

| | | |
|---|---|---|
| Item No. A — | For signal and telegraph line changes not located within any part of the area claimed by the Government to be an encroachment. | ($ 6,037.88) |

| | | |
|---|---|---|
| Item No. B — | For engineering and contingencies upon Item No. A above | ($ None ) |
| Item No. C — | For signal and telegraph changes within the area claimed by the Government to be an encroachment between stations 70+80W and 74+30W, and/or railroad stations 4930+56.5 to railroad station 4934+06.5, claimed by the Government to be an encroachment. | ($ 133.38) |
| Item No. D — | For engineering and contingencies upon Item No. D above. | ($ None ) |
| Item No. E — | For signal and telegraph line changes between Government station 36+50W to Government station 55+50W, and/or railroad station 4949+36.5 to railroad station 4968+36.5, claimed by the Government to be an encroachment. | ($ 722.00) |
| Item No. F — | For engineering and contingencies upon Item E above. | ($ None ) |
| Item No. G — | For signal and telegraph line changes between Government station 15+17W to Government Station 22+30W, and/or railroad station 4982+56.5 to railroad station 4989+16.5, claimed by the Government to be an encroachment. | ($ 250.80) |
| [fol. 38] Item No. H. — | Engineering and contingencies upon Item No. G above. | ($ None ) |
| | Total | $ 7,144.06 |

We further find that the petitioner went into possession of said property by order of this Court on August 4, 1934, and we submit to the Court without passing thereupon the matter of the allowance of interest to the condemnees.

Dated at St. Paul, Minnesota, this 6th day of April, 1935.

P. H. HARRINGTON,
Chairman.

HARRY D. SMITH,
Secretary.

J. L. GANGNAGEL,
Commissioners.

Endorsed—Further Report and Award of Commissioners 459) Filed April 8, 1935, Margaret L. Mullane, Clerk.

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[fol. 39] (Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph and Cable Company in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of the Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)
File No. 460 At Law.
File No. 461 At Law.

We, the undersigned, Commissioners appointed by the Court in this proceeding to ascertain and report the amount of damages sustained and the compensation due the owners and persons interested in the tracts of land taken and condemned in this proceeding, and upon which land easements are being taken, do hereby report as respects the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al, for the taking, appropriation and condemnation by the petitioner of the easement hereinafter described and as respects the claim of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company for the taking, appropriation and condemnation by the petitioner herein of the easements hereinafter described as follows:

We met at the time and place designated in the order of appointment, took and subscribed the oath of office and filed the same with the Clerk of the Court. P. H. Harrington was elected chairman and Harry D. Smith was elected secretary. The hearing on the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the joint claim of said Railroad Company and Western Union

Telegraph and Cable Company was conducted separately from the hearings of other owners named in this condemnation proceeding. John J. Courtney, Special Assistant to the Attorney General, appeared on behalf of the petitioner and A. C. Erdall appeared on behalf of said Railroad Company and said Telegraph Company.

At our first meeting we fixed the time and place for viewing the premises and did view the premises with the representatives of each of the parties and of the petitioner.

[fol. 40] We fixed the time and place for hearing the testimony of all of the parties interested and heard all the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner.

Now, therefore, having taken the oath, viewed the premises and heard the testimony offered on behalf of the Railroad Company and the Telegraph Company and all of the testimony offered on behalf of the petitioner and having received the instructions of the Court and after listening to the arguments of counsel and having in all respects fully complied with the order of the Court and the law relating to this proceeding, we do hereby make and report our award as to the claim of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the sum of Seventy Eight Thousand Three Hundred Ninety One and no/100 ($78391.01) Dollars, for the taking of an easement in and over the right of way and interests of said Railroad Company as the same is laid out and operated over and through the parcels of land more particularly described in the petition for condemnation herein and to and including a point within the limits of Wabasha County, Minnesota, which, by stipulation of the parties, is agreed to be a point on said right of way numbered railroad station 4818+45 and Government station 186+42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnations herein, reference being had thereto for particularity.

By stipulation of the parties made during the hearing, and it is so stipulated herein, the easement recited in the

petitions for condemnation in Law Numbers 460 and 461 are hereby consolidated and this Report and Award is in full for both of the easements recited in both of said cases.

It was further stipulated and is so stipulated in this Report and Award by said Railroad Company and Telegraph Company and the petitioner that the award to said Western Union Telegraph and Cable Company shall be and it hereby is merged in the claim of said Railroad Company for signal and telegraph lines and changes claimed to be necessary therein and that the award for such signal and telegraph changes shall be and it hereby is made jointly to said Railroad Company and the said Telegraph Company and that the said Railroad Company and Telegraph Company, after the making of such award, will make any necessary allocation or adjustments of amounts among themselves.

[fol. 41] Upon such stipulation and upon the same showing as hereinbefore recited, we do hereby make and report and award jointly to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company in the sum of Thirty Six Hundred Ninety and 51/100 Dollars ($3690.51) Dollars, for the taking of an easement as described in the petitions for condemnation herein in and over the right of way and interests of said Railroad Company as laid out and operated over and through the parcels of land more particularly described in the petitions for condemnation herein, that is to say in Law Numbers 460 and 461 and to and including a point within the limits of Wabasha County, Minnesota, which by stipulation of the parties is agreed to be a point on said right of way railroad station numbered 4818+45 and Government station 186 + 42W, the purposes and particulars and nature of said easement being more particularly described in the petition for condemnation herein, reference being had thereto for particularity.

In arriving at the aforesaid award in favor of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, we allowed for the respective items of claim the amounts set opposite each item thereof as follows:

| | |
|---|---|
| Item No. 1 — For riprap within the area of this condemnation excepting therefrom riprap within the area claimed by the Government to be an encroachment. | ($ 26549.13) |
| Item No. 2 — For bank widening within the area of this condemnation and excepting therefrom such portion as may lay within the area claimed to be an encroachment by the Government. | ($ 4793.43) |
| Item No. 3 — For raise in grade for the area within this condemnation excepting such part as lays within the area claimed by the Government to be an encroachment. | ($ 8294.65) |
| Item No. 4 — For culvert and bridge number L-90 | ($ 13654.00) |
| Item No. 5 — For smaller culverts not particularly identified and located without the limits of any claimed encroachment by the Government. | ($ 759.00) |
| Item No. 6 — For engineering and contingencies upon the above numbered items. | ($ None ) |
| Item No. 7 — For riprap within the 870 lineal feet between Government stations 200 + 30 to 209 + 00, and railroad stations 4804 + 56.5 to station 4795 + 86.5, claimed by the Government to be an encroachment | ($ None ) |
| Item No. 8 — For culverts numbered 595 and 599, situate within the limits of the encroachment described in Item No. 7 above. | ($ None ) |
| Item No. 9 — For engineering and contingencies upon Item No. 7 above. | ($ None ) |
| [fol. 42] Item No. 10 — For engineering and contingencies upon Item No. 8 above. | ($ None ) |
| Item No. 11 — For culvert numbered L-84 | ($22,128.00) |
| Item No. 12 — For engineering and contingencies upon Item No. 11 above | ($ 2,212.80) |
| Total | $78,391.01 |

In arriving at the aforesaid joint award in favor of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company on account of signal and telegraph changes, we allowed for the respective items of claim the amount set opposite each item thereof as follows:

| | | |
|---|---|---|
| Item No. A — | For signal and telegraph changes without the limits of any claimed encroachment by the Government | ($ 3,690.56) |
| Item No. B — | For contingencies and engineering upon Item No. A above. | ($ None ) |
| Item No. C — | For signal and telegraph changes within the area claimed by the Government to be an encroachment and described above. | ($ None ) |
| Item No. D — | For contingencies and engineering on Item No. C above. | ($ None ) |
| | Total | $ 3,690.51 |

We further find that the Petitioner went into possession of said property by order of this Court on August 4, 1934, and we submit to the Court without passing thereupon the matter of the allowance of interest to the condemnees hereinbefore referred to.

Dated at St. Paul, Minnesota, this 6th day of April, 1935.

P. H. HARRINGTON,
Chairman.

HARRY D. SMITH,
Secretary.

J. L. GENGNAGEL,
Commissioners.

[fol. 43] (Endorsed—Further Report and Award of Commissioners 460-461) Filed April 8, 1935, Margaret L. Mullane, Clerk.

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[fol. 44] Notice of Appeal from Further Report and Award of Commissioners as to Easements in and Over the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company Right-of-Way.

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—L/D #5, Minneiska)

File No. 459 At Law

United States of America, by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota, containing 32 Acres; the State of Minnesota, et al., Respondents.

To: The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company jointly, and to A. C. Erdall and F. W. Root, Attorneys for said Companies, and to all whom it may concern:

Please take notice that the United States of America, the Petitioner herein, hereby appeals to the above-named Court from the Further Report and Award made by P. H. Harrington, Harry D. Smith and J. L. Gangnagel, Commissioners appointed by the above-named Court, which said award was dated April 6, 1935 and filed with the Clerk of the above named Court in said Court on April 8, 1935, Notice of Filing of which was served on the Petitioner on April 16, 1935 and service of the Notice of the Filing of which was served upon the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph & Cable Company on April 17, 1935, all of which appears more particularly by the files, records and proceedings in this cause, awarding to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the reputed owner of the lands and tracts of lands and easements hereinafter described, the sum of $161,134.23, and to the said [fol. 45] Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the said Western Union Telegraph & Cable Company, jointly, the sum of $7,144.06.

The lands and easements in lands to which this said appeal relates are described in the Petition for Condemnation as:

"The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul & Pacific Railroad right-of-way up to an elevation of 660 feet above mean sea level

datum (1912 adjustment) as said right-of-way is now laid out and operated over and across and through the following parcels of land, viz.:

Lot 4, Section 17, Township 108 N. Range 8 W., 5th P. M.

Lot 1, Sec. 18, Twp. 108 N. Range 8 W., 5th P. M.

Lots 1, 2 and 3, Sec. 17, Twp. 108 N. Range 8 W., 5th P. M.

Lots 1 and 2, Sec. 12, Twp. 108 N. Range 9 W., 5th P. M.

Lots 1, 2 and 3, Sec. 1, Twp. 108 N. Range 9 W., 5th P. M.

Lot 1, Sec. 2, Twp. 108 N. Range 9 W., 5th P. M.

all situate in the County of Winona, State of Minnesota."

Said appeal is taken upon the grounds first, that said award is excessive; second, that said award is not justified by the facts and that the evidence is not sufficient to sustain it; third, that said award was made under erroneous instructions from the Court, and fourth, that said award was arrived at by erroneous application of the law relating thereto by the Commissioners.

Dated at St. Paul, Minnesota, this 4th day of May, 1935.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
By John J. Courtney,
Special Assistant to the Attorney General.
214 Federal Courts Bldg.
St. Paul, Minnesota.

(Endorsed—Notice of Appeal from Further Report and Award of Commissioners 459) Filed May 4, 1935, Margaret L. Mullane, Clerk, By Catherine Murphy, Deputy.

[fol. 46] Notice of Appeal from Further Report and Award of Commissioners as to Easements in and Over the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company Right-of-Way.

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America, by Geo. F. Sullivan, U. S. Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Edward M. Davidshofer, et al.,

and vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Farmers & Merchants State Bank of Wabasha, Minne., et al., Respondents.

To: The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company jointly, and to A. C. Erdall and F. W. Root, Attorneys for said Companies, and to all whom it may concern:

Please take notice that the United States of America, the Petitioner herein, hereby appeals to the above-named Court from the Further Report and Award made by P. H. Harrington, Harry D. Smith and J. L. Gengnagel, Commissioners appointed by the above-named Court, which said award was dated April 6, 1935 and filed with the Clerk of the above-named Court in said Court on April 8, 1935, No-

tice of Filing of which was served on the Petitioner on April 16, 1935 and service of the Notice of Filing of which was served upon the said Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph & Cable Company on April 17, 1935, all of which appears more particularly by the files, records and proceedings in this cause, awarding to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the reputed owner of [fol. 47] the lands and [and] tracts of lands and easements hereinafter described, the sum of $78,391.01, and to the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the said Western Union Telegraph & Cable Company, jointly, the sum of $3,690.51.

The lands and easements in lands to which this said appeal relates are described in the Petition for Condemnation as:

"The flowage easement to be taken is in and over the Chicago, Milwaukee, St. Paul & Pacific Railroad right-of-way up to elevation of 660 feet above mean sea level datum (1912 adjustment) as said right-of-way is now laid out and operated over and across and through the following parcels of land, viz.:

| | 5th P. M. |
|---|---|
| Lot 1 | Sec. 35, T. 109 N., R. 9 W |
| SW¼ of the NW¼, Lots 3, 4 and 5 | Sec. 34, T. 109 N., R. 9 W |
| SE¼ of the NE¼, SW¼ of the NE¼, SE¼ of the NW¼, SW¼ of the NW¼ and NW¼ of the NW¼ | Sec. 33, T. 109 N., R. 9 W |
| NE¼ of the NE¼, NW¼ of the NE¼ and NE¼ of the NW¼ | Sec. 32, T. 109 N., R. 9 W |
| SE¼ of the SW¼, NE¼ of the SW¼ and NW¼ of the SW¼ | Sec. 29, T. 109 N., R. 9 W |
| NW¼ of the NW¼ | Sec. 29, T. 109 N., R. 9 W |
| NE¼ of the NE¼ | Sec. 30, T. 109 N., R. 9 W |
| SE¼ of the SE¼ and SW¼ of the SE¼ | Sec. 19, T. 109 N., R. 9 W |

all situate in the County of Wabasha, State of Minnesota."

as said tracts and easements are described in the Petitions for Condemnation in File Nos. Law 460 and 461.

Said appeal is taken upon the grounds first, that said award is excessive; second, that said award is not justified by the facts and that the evidence is not sufficient to sustain it; third, that said award was made under erroneous instructions from the Court, and fourth, that said award was arrived at by erroneous application of the law relating thereto by the Commissioners.

Dated at St. Paul, Minnesota, this 4th day of May, 1935.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
John J. Courtney,
Special Assistant to the Attorney General,
214 Federal Courts Bldg.,
St. Paul, Minnesota.

(Endorsed—Notice of Appeal from Further Report and Award of Commissioners 460-461) Filed May 4, 1935, Margaret L. Mullane, Clerk. By Catherine Murphy, Deputy.

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[fol. 48] (Verdict in Cases Nos. 407, 459, 460 and 461.)

We, the jury in the above entitled causes, assess the compensation due the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the trustees under its mortgages, and the Western Union Telegraph Company, for the taking of the flowage easements described in the petitions herein, and the amendments thereto in the total sum of $177,594.68 dollars.

(1) Included in and as a part of our general verdict, we have allowed to the Railroad Company, the trustees under its mortgages, and the Telegraph Company, the sum of $9,831.00 dollars, for changes in and protection of their telephone, telegraph and signal lines.

(2) Included in and as a part of our general verdict, we have allowed to the railroad company and the trustees

under its mortgages the following amounts for changes in and protection of:

(a) Culvert L-527 ..... $ 2,982.47 dollars;

(b) Culvert L-80 ..... 2[illegible],122.46 dollars;

(c) Culvert L-84 ..... 20,470.00 dollars;

(d) Bridge L-82 ..... 12,650.00 dollars;

(e) Bridge L-90 ..... 0.00 dollars;

(3) Included in and as a part of our general verdict, we have allowed to the Railroad Company and the Trustees under its mortgages, the sum of $2,118.75 for changes in and protection of all the following designated small bridges and culverts:—L-82½, L-545½, L-549, L-551, L-565, L-567, L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613, and L-629.

(4) Included in and as a part of our general verdict, we have allowed to the Railroad Company and the trustees under its mortgages, the sum of $101,420.00 dollars for necessary riprap and bank protection of the railroad embankments.

Dated this 20th day of December, A. D. 1935.

W. F. DEWITT,
Foreman.

(Endorsed—Verdict 407, 459, 460, 461) Filed December 20, 1935. Margaret L. Mullane, Clerk, By Kathryn F. O'Connor, Deputy.

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[fol. 49] Stipulation With Reference to Division of Verdict and Form of Entry of Judgment.

United States District Court, District of Minnesota, First Division.

No. 407. At Law.
No. 459. At Law.
No. 460. At Law.
No. 461. At Law.

The United States and the respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States

Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as successor Trustees, Guaranty Trust Company of New York and Merrel P. Gallaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company, without waiving any rights herein which they may have for a new trial or for an appeal from the judgment to be entered upon the verdict of the jury herein stipulate as follows:

Railroad Culvert L-84, which has now been rebuilt, and is known as Bridge L-84, was and is located on the county line between Wabasha and Winona Counties, and it is stipulated that the verdict for changes made at said L-84 may be herein treated as though it were located wholly in Winona County and may be added to the verdict in Law File 459 in said county.

[fol. 50] The verdict in File No. 459, No. 460 and No. 461 of this court being $177,594.68, and the award of the commissioners in Law File No. 407 being $58.50, upon which no proof was introduced in the trial had in this court for the reason that both parties are satisfied with the amount of said award for the lands therein taken, it is stipulated that the verdict in Winona and Wabasha counties may be sub-divided as follows:

Wabasha County—Law File No. 460 and No. 461.

General Verdict—$32,250.01

| | |
|---|---|
| Special Finding No. 1—Signal and Telegraph Changes | $ 2,678.95 |
| Special Finding No. 2(e)—Bridge L-90 | None |
| Special Finding No. 3—Small Culverts L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613 and L-629 | 1,771.84 |
| Special Finding No. 4—Riprap and bank protection | 27,799.22 |
| Total | $ 32,250.01 |

Winona County—File Law No. 459.

General Verdict—$145,344.67

| | | |
|---|---|---|
| Special Finding No. 1—Signal and Telegraph Changes | $ | 7,152.05 |
| Special Finding No. 2(a)—Culvert L-527 | | 2,982.47 |
| Special Finding No. 2(b)—Culvert L-80 | | 28,122.46 |
| [fol. 51] Special Finding No. 2(c)—Culvert L-84 | $ | 20,470.00 |
| Special Finding No. 2(d)—Bridge L-82 | | 12,650.00 |
| Special Finding No. 3—Small Culverts L-82½, L-545½, L-549, L-551, L-565, L-567 | | 346.91 |
| Special Finding No. 4—Riprap and bank protection | | 73,620.78 |
| Total | | $145,344.67 |

It Is Further Stipulated

That judgment may be entered in Winona County in Law File No. 407 of this court in the sum of $58.50, together with interest thereon from July 28, 1933 to the date of entry of judgment at the rate of 6% per annum;

That judgment may be entered in Winona County in Law File No. 459 of this court in the sum of $145,344.67, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum;

That judgment may be entered in Wabasha County in Law File No. 460 and No. 461 of this court in the sum of $32,250.01, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum; and

It Is Further Stipulated that said judgment in File Law No. 460 and No. 461 may be entered in Law File No. 461 and that the Clerk may enter in the docket of Law File No. 460 that judgment covering lands of said Railroad Com- [fol. 52] pany, said Trustees, and said Western Union

Telegraph Company is included within the judgment in Law File No. 461.

Dated, January 6th, 1936.

JOHN J. COURTNEY &
JOHN T. HARRINGTON,
Special Assistants to the Attorney General of the United States.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as Successor Trustees, Guaranty Trust Company of New York and Merrel P. Gallaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company.

(Endorsed—Stipulation for Division of Verdict 407-459, 460, 461) Filed January 6, 1936, Margaret L. Mullane, Clerk.

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[fol. 53] (Judgment, January 6, 1936.)

In the District Court of the United States in and for the District of Minnesota, First Division.

Equity Journal

Term Minutes.

June Term, A. D. 1935.

January 6, 1936.

Monday morning.

Court opened pursuant to adjournment.

Present: Honorable Joseph W. Molyneaux, Judge.
Honorable Matthew M. Joyce, Judge.

(Before Molyneaux, J.)

In the Matter of

The Condemnation by the United States of America of Certain Lands Situated in Winona County, Minnesota, Described as Tract No. Wi-1 Containing 1.30 Acres More or Less and Tract No. Wi-2 Containing .65 Acres More or Less, Required for the Improvement of Navigation in the Mississippi River.

(First Condemnation)
(Lock and Dam No. 5—Minneiska).

File No. 407. At Law. Dkt. #10144

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Condemnation—32 acres)
(Lock and Dam No. 5—Minneiska).

File No. 459. At Law. Dkt. #10276.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third Condemnation—3140 acres)
(Lock and Dam No. 5—Minneiska.)

File No. 460. At Law. Dkt. #10277.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Fourth Condemnation—1960 acres)
(Lock and Dam No. 5—Minneiska).

File No. 461. At Law. Dkt. #10280.

[fol. 54] Wherefore, in accordance with said stipulation and order for judgment, it is by the Court:

Considered, Ordered and Adjudged that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the respondents Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States Trust Company of New York as Trustees, Chemical Bank & Trust Company and Howard B. Smith as Successor Trustees, Guaranty Trust Company of New York and Merrel P. Callaway as Trustees, The National City Bank of New York and William W. Hoffman as Trustees, and the Western Union Telegraph Company, in Law File No. 459, No. 460 and No. 461 from August 4, 1934 to the date of entry of judgment in said causes, and that the same be included in and be made a part of such judgment, and that the United States is allowed an exception thereto; that interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes.

Further Ordered that the following provision or limitation upon the flowage easement acquired by the United States in Law File No. 459, No. 460 and No. 461, be and the same is hereby included and made a part hereof:

"The United States is granted a flowage easement to maintain a normal pool upstream from Lock and Dam No. 5 which shall not at any point along the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the property of the Western Union Telegraph Company exceed the surface elevation of 660 feet above mean sea level datum.

"Said easement shall include wave and ice action upon a pool maintained and permitted herein as aforesaid, but does not and shall not include the right by swellhead or backwater effect in the Mississippi River to raise the waters of the Mississippi River or its tributaries to an elevation in excess of 660 feet above mean sea level datum at any point along the right of way and property of said Railroad and Telegraph Companies herein involved."

Further Ordered That the Verdict for changes made at Railroad Culvert L-84, which has now been rebuilt and is known as Bridge L-84, and which was and is located on the county line between Wabasha and Winona Counties, be herein treated as though it were located wholly in Winona County and be added to the verdict in Law File 459 in said county, and

That the verdict in Law File No. 459, No. 460 and No. 461 of this Court being $177,594.68, and the award of the commissioners in Law File No. 407 being $58.50, upon which no proof was introduced in the trial had in this court for the reason that both parties are satisfied with the amount of said award for the lands therein taken, it is hereby or- [fol. 55] dered and adjudged that the verdict in Winona and Wabasha counties be sub-divided as follows:

Wabasha County—Law File No. 460 and No. 461.

General Verdict—$32,250.01

| | |
|---|---|
| Special Findings No. 1— Signal and Telegraph Changes | $2,678.95 |
| Special Findings No. 2 (e)—Bridge L-90 | none |
| Special Findings No. 3— Small Culverts L-595, L-599, L-601, L-603, L-603⅔, L-605, L-607, L-609, L-611, L-613, and L-629 | 1,771.84 |
| Special Finding No. 4— Riprap and bank protection | 27,799.22 |
| Total | $32,250.01 |

Winona County—Law File No. 459.

General Verdict—$145,344.67

| | |
|---|---|
| Special Finding No. 1— Signal and Telegraph Changes | $ 7,152.05 |
| Special Finding No. 2 (a)—Culvert L-527 | 2,982.47 |
| Special Finding No. 2 (b)—Culvert L-80 | 28,122.46 |
| Special Finding No. 2 (c)—Culvert L-84 | 20,470.00 |
| Special Finding No. 2 (d)—Bridge L-82 | 12,650.00 |

| | |
|---|---|
| Special Finding No. 3— | |
| Small Culverts L-82½, L-545½, L-549, L-551, L-565, L-567 | 346.91 |
| Special Finding No. 4— | |
| Riprap and bank protection | 73,620.78 |
| Total | $145,344.67 |

It Is Further Ordered and Adjudged that judgment may be entered in Winona County in Law File No. 407 of this Court in the sum of $58.50, together with interest thereon from July 28, 1933 to the date of entry of judgment at the rate of 6% per annum.

That judgment may be entered in Winona County in Law File No. 459 of this Court in the sum of $145,344.67, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum.

That judgment may be entered in Wabasha County in Law File No. 460 and 461 of this Court in the sum of $32,250.01, together with interest thereon from August 4, 1934 to the date of entry of judgment at the rate of 6% per annum; and

That said judgment in Law File No. 460 and No. 461 may be entered in Law File No. 461 and that the Clerk may enter in the docket of Law File No. 460 that judgment [fol. 56] covering lands of said Railroad Company, said Trustees, and said Western Union Telegraph Company is included within the judgment in Law File No. 461.

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[fol. 57] (Notice of Appeal by United States in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney, for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain Land in Winona County, Minn.; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

Please Take Notice, That the United States of America appeals to the Circuit Court of Appeals for the Eighth Circuit from the judgment of the United States District Court for the District of Minnesota (First Division), entered in the office of the Clerk of said Court on the sixth (6th) day of January, 1936, and from each and every part of said judgment.

Dated this 3rd day of April, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota,

JOHN J. COURTNEY,
Special Assistant to the Attorney General,
214 Federal Courts Bldg.,
St. Paul, Minnesota.

To: Margaret L. Mullane, Clerk, United States District Court for the District of Minnesota.
A. C. Erdall and F. W. Root, Attorneys for appellee.

Service of the foregoing Notice of Appeal by copy thereof is hereby admitted this 3rd day of April, 1936.

F. W. ROOT &
A. C. ERDALL,
Attorneys: Chicago, Milwaukee St. Paul & Pacific Ry. Co. & Western Union Telegraph & Cable Company.

[fol. 58] (Endorsed—Notice of Appeal 459) Filed April 3, 1936. Margaret L. Mullane, Clerk, By Kathryn F. O'Connor.

[fol. 59] (Notice of Appeal by United States in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St. Paul, & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

Please Take Notice That the United States of America appeals to the Circuit Court of Appeals for the Eighth Circuit from the judgment of the United States District Court

for the District of Minnesota (First Division), entered in the office of the Clerk of said Court on the sixth (6th) day of January, 1936, and from each and every part of said judgment.

Dated this 10 day of August, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney for the District of Minnesota.

JOHN J. COURTNEY,
Special Assistant to Attorney General, 214 Federal Cts. Bldg., St. Paul, Minn.

To: Margaret L. Mullane, Clerk, United States District Court for the District of Minnesota.

A. C. ERDALL and
F. W. ROOT,
Attorneys for appellees.

[fol. 60] Service of the foregoing Notice of Appeal by copy thereof is hereby admitted this 11th day of August, 1936.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Chicago, Milwaukee, St. Paul & Pacific Ry. Co., its Trustees, and Western Union Telegraph & Cable Company.

(Endorsed—Notice of Appeal 460, 461) Filed August 11, 1936. Margaret L. Mullane, Clerk. By Olive Davies, Deputy.

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[fol. 61] (Petition for Appeal in Cases No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

To the Honorable the United States District Court for the District of Minnesota, First Division:

Your Petitioner, the United States of America who, feeling aggrieved by the judgment entered in the above-entitled cause on the sixth (6) day of January, 1936, files its Assignment of Errors and Notice of Appeal herewith, and petitions this Honorable Court to allow said appeal;

Your Petitioner, respectfully shows that it has filed in the office of the Clerk of the above Court, a written notice that it appeals from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons and upon the grounds set forth in the Assignment of Errors filed as aforesaid; that no bond, obligation or security is required of the Petitioner under the provisions of Section 1001 Revised Statutes of the United States, the said Petitioner being the United States of America.

That by reason thereof Citation should be issued as provided by law and a transcript duly authenticated should be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

[fol. 62] Wherefore Your Petitioner Prays That a Citation be issued and that a transcript duly authenticated of the record in said cause be sent to the United States Circuit Court of Appeals for the Eighth Circuit, according to law and the rules of said Court.

Dated this 3rd day of April, 1936.

THE UNITED STATES OF AMERICA, Petitioner,
By George F. Sullivan,
United States Attorney for the District of Minnesota.
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

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(Order Allowing Appeal in Case No. 459.)

Upon the foregoing Petition, and upon all the files, records and proceedings in the above-entitled matter,

It Is Hereby Ordered That said appeal be allowed as prayed for; that a Citation be issued as provided by law, and that a duly authenticated transcript of record be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and it satisfactorily appearing to the Court that this appeal is taken by the United States of America, accordingly no bond, obligation or security is required of Petitioner on this appeal.

Dated this 3rd day of April, 1936.

JOSEPH W. MOLYNEAUX,
United States District Judge for the District of Minnesota (First Division).

(Endorsed—Petition and Order Allowing Appeal 459) Filed April 3, 1936, Margaret L. Mullane, Clerk. By Kathryn F. O'Connor.

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[fol. 63] (Petition for Appeal in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To the Honorable the United States District Court for the District of Minnesota, First Division:

Your Petitioner, the United States of America who, feeling aggrieved by the judgment entered in the above-entitled cause on the sixth (6) day of January, 1936, files its Assignment of Errors and Notice of Appeal herewith, and petitions this Honorable Court to allow said appeal;

Your Petitioner respectfully shows that it has filed in the office of the Clerk of the above Court, a written notice that it appeals from said judgment to the United States [fol. 64] Circuit Court of Appeals for the Eighth Circuit for the reasons and upon the grounds set forth in the Assignment of Errors filed as aforesaid; That no bond, ob-

ligation or security is required of the Petitioner under the provisions of Section 1001 Revised Statutes of the United States, the said Petitioner being the United States of America.

That by reason thereof Citation should be issued as provided by law and a transcript duly authenticated should be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Wherefore Your Petitioner Prays That a Citation be issued and that a transcript duly authenticated of the record in said cause be sent to the United States Circuit Court of Appeals for the Eighth Circuit, according to law and the rules of said Court.

Dated this 10th day of April, 1936.

THE UNITED STATES OF AMERICA, Petitioner,
By George F. Sullivan,
United States Attorney for the District of Minnesota.

John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

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(Order Allowing Appeal in Cases Nos. 460 and 461.)

Upon the foregoing Petition, and upon all the files, records and proceedings in the above entitled matter,

It Is Hereby Ordered That said appeal be allowed as prayed for; that a Citation be issued as provided by law, and that a duly authenticated transcript of record be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and it satisfactorily appearing to the Court that this appeal is taken by the United States of America, accordingly no bond, obligation or security is required of Petitioner on this appeal.

Dated this 10 day of August, 1936.

JOHN B. SANBORN,
U. S. Circuit Judge.

[fol. 65] (Endorsed—Petition for Appeal 460-461) Filed August 10, 1936. Margaret L. Mullane, Clerk. By Olive Davies, Deputy.

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[fol. 66] (Citation and Admission of Service in Case No. 459.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

File No. 459 At Law

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

To The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company, and to F. W. Root, and A. C. Erdall, its attorneys:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit at the City of Saint Louis in the State of Missouri, forty (40) days from and after the date this Citation bears, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Minnesota, First Division, wherein the United States of America is appellant and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Western Union Telegraph & Cable Company are appellees, to show cause, if any there be, why the judgment rendered

in said cause against the said appellant should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand in the City of Saint Paul, State of Minnesota, in the District and Circuit above-named, this 3rd day of March, in the year of our Lord one thousand nine hundred thirty-six.

JOSEPH W. MOLYNEAUX,
United States District Judge.

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Due service of the above Citation is hereby admitted this 3rd day of March, 1936.

F. W. ROOT &
A. C. ERDALL,
Attorneys for Chicago, Milwaukee, St. Paul & Pacific RR. Co., & Western Union Telegraph & Cable Company.

[fol. 67] Endorsed: Filed in U. S. District Court on April 3, 1936.

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[fol. 68] (Citation and Admission of Service in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents,

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To The Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Western Union Telegraph & Cable Company, and to F. W. Root, and A. C. Erdall, their attorneys:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit at the City of Saint Louis in the State of Missouri, forty (40) days from and after the date this Citation bears, pursuant to an appeal filed in [fol. 69] the office of the Clerk of the United States District Court for the District of Minnesota, First Division, wherein the United States of America is appellant and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cumrings and George I.

Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Western Union Telegraph & Cable Company are appellees, to show cause, if any there be, why the judgment rendered in said cause against the said appellant should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand in the City of Saint Paul, State of Minnesota, in the District and Circuit above-named, this 10 day of August, in the year of our Lord one thousand nine hundred thirty-six.

JOHN B. SANBORN,
U. S. Circuit Judge.

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Service of the above Citation is hereby admitted this 11th day of August, 1936.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for the C. M. St. P. & P., its Trustees, and Western Union Telegraph & Cable Company.

[fol. 70] Endorsed: Filed in U. S. District Court on August 11, 1936.

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[fol. 71] (Assignment of Errors in Case No. 459.)

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Second Cond., 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

File No. 459. vs. At Law.

Certain Land in Winona County, Minn., Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents.

Now comes the United States of America, the Petitioner in the above-entitled proceedings, in connection with and as a part of its Petition for Appeal herein, assigns the following errors, which it avers were committed by the District Court in its rulings, orders and instructions upon which the Petitioner relies to reserve the judgment entered herein.

Error No. I.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 2.

You are instructed that with reference to the bridges and culverts, the Railroad Company asserts a claim for alteration of such structures. Insofar as the claimed necessity for such alterations is founded upon an anticipated deposition of silt and debris in such culverts and bridges, you are instructed that no recovery may be awarded where the testimony shows that the silt and debris is carried to the culverts and bridges by tributary streams which flow into the Mississippi River. The carriage of silt and debris by tributary streams is an independent, natural force over which the Government has no control, and for which it [fol. 72] may be subjected to no liability. If you are satisfied by a fair preponderance of the evidence that the existence of the 660 pool created by Lock and Dam No. 5 contributes to the deposition of silt so carried by the tributary streams, and in such a manner as to clog the culverts and bridges of the Railroad Company, there would still be no right of recovery against the United States, since such an event is a consequential injury resulting from the pool which does not constitute a taking."

To which refusal exception was duly noted.

Error No. II.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 4.

"The liability of the United States in this proceeding is governed primarily by the Fifth Amendment to the United States Constitution. That amendment provides that the United States, when it takes private property for public use, shall pay a just compensation therefor. The liability of the Government consequently arises only when private property is taken for public use, and excludes those situations where the property is merely damaged but not appropriated. A taking of the property occurs when by reason of some act of the United States the owner is directly ousted of his use and possession of the property. If the act of the Government does not so oust the owner, but inflicts upon his property an injury, the United States sustains no liability. Where it appears from the facts that the United States is improving a navigable river, as a result of which injury is inflicted upon adjoining lands, and the facts further disclose that by resorting to protective measures, the owner of such land can ward off the injurious consequences, no liability is thereby imposed upon the United States. The reason for such non-liability follows from the contention of the Fifth Amendment that payment of compensation is only required where the property is taken. Obviously the property cannot be said to be taken where, after the alleged taking, it remains in the use and possession of the owner.

"You are consequently instructed that in the case at bar, the property of the Chicago, Milwaukee, St. Paul and [fol. 73] Pacific Railroad Company and of the Western Union Telegraph Company has not been taken as a result of the raising of the pool and the condemnation of the easement to elevation 660 against the embankment and structures of the said Companies. The evidence discloses that by resorting to protective measures, the property of the Railroad Company and of the Western Union Company will remain in their full and complete use and possession to the same exent and as prior to the commencement of this condemnation suit, subject only to the concurrent use of a portion of the right-of-way to elevation 660 by the United States.

"You are instructed that the just compensation therefor, to which the respondents are entitled, is the value of the concurrent usage by the United States of that portion of the properties of the said respondents lying within the limits of the easement condemned, and is not the sum of money which will compensate the said respondents for the injury or damage done to their respective properties by reason of the presence of the pool water at elevation 660 above mean sea level datum."

To which refusal exception was duly noted.

Error No. III.

That the Court erred in instructing the jury as follows:

"For all damage directly and proximately caused to the Railroad Company and the Telegraph Company by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the government in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark and up to 660 feet above mean sea level, it must pay compensation for any damage that it does or for any taking."

To which exception was duly noted.

Error No. IV.

That the Court erred in instructing the jury as follows:

"In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Gov-[fol. 74] ernment, the costs of adjusting the railroad structures and the telegraph structures so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary

by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place the Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking."

To which exception was duly noted.

Error No. V.

That the Court erred in charging the jury as follows:

"They (the respondents) are entitled to have the railroad property, including the culverts, bridges and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties."

To which exception was duly noted.

Error No. VI.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owner of property along the Mississippi river has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right * * * and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent."

[fol. 75] To which exception was duly noted.

Error No. VII.

That the Court erred in instructing the jury as follows:

"You are instructed that the right to have the water flow away from bridges and culverts extending through the

railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage occurs by reason of the water being raised in the Mississippi river above the level of ordinary high water mark. That is, this instruction that the property owner,—in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark."

To which exception was duly noted.

Error No. VIII.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi river above the level of ordinary high water mark."

To which exception was duly noted.

Error No. IX.

That the Court erred in instructing the jury as follows:

"You are instructed that if the impounding of the waters of the Mississippi river by the construction of Lock and Dam No. 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embank- [fol. 76] ments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation wh h said Railroad and Tele-

graph Companies are entitled to recover from the United States."

To which exception was duly noted.

Error No. X.

That the Court erred in instructing the jury as follows:

"There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said flowage easement and all damages, present and future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings."

To which exception was duly noted.

Error No. XI.

That the Court erred in denying the motion of the Government upon the opening statement of the respondents to instruct the jury to return a verdict in favor of the Government in each of the three cases now on trial in the sum of $1.00, upon the grounds that from the opening statement of counsel it appears conclusively there has been no taking of the railroad property within the meaning of the Constitution, and upon the ground that the only asserted claims are for consequential injuries which are not compensable in a proceeding of this character under the Fifth Amendment, and that the damages stated are wholly prospective, which motion was denied and an exception duly noted.

Error No. XII.

That the Court erred in overruling the government's offer of proof as follows:

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet; between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low

water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of [fol. 77] the Railroad embankments at the above stated locations where the Government contends the Railroad embankments are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States Chief of Engineers other than is evidenced by the Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rhame, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation." to which offer objection was made and which objection was sustained as follows:

"The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and an exception allowed."

Error No. XIII.

That the Court erred in denying the motion of the United States to dismiss from the proceedings four segments of railroad property as follows: between stations 4990 plus 86.5 to 4978 plus 86.5, and between stations 4968 plus 86.5 to 4948 plus 86.5, between stations 4936 to 4927, between stations 4807 to station 4798; which said motion was duly filed in writing and incorporated in the record and made pursuant to a direction of the Secretary of War of the United States, a properly authenticated copy of which was filed in the proceedings, and to the refusal to grant which an exception was duly noted.

Error No. XIV.

That the Court erred in denying the Government's written motion as follows, to-wit:

"Motion For Directed Verdict.

"Now comes the petitioner, the United States of America, and respectfully moves the Court to peremptorily in-

struct the jury herein to return a verdict in favor of the respondents, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the Western Union Telegraph Company, in the sum of One ($1.00) Dollar for the reasons following:

1. The liability of the United States in this proceeding is limited by the Fifth Amendment to the United States Constitution to the payment of compensation for private property taken for public use.

2. Property is taken within the purview of the Fifth Amendment only where the evidence discloses a direct invasion of the property of respondents directly resulting in an ouster of the owner's use and possession.

3. The United States is in no event liable for an injury to property which does not so result in an ouster of the owner's use and possession.

[fol. 78] 4. The United States is not liable for the cost of reconstructing or altering property for the purpose of restraining the flowage of water upon such property nor for the cost of reconstructing or altering property to withstand the injurious effects of water where the presence of such water, and in the absence of such protective measures, would not constitute a taking of such property.

5. Consequently, the true measure of the liability of the United States in this proceeding is not the cost of raising, riprapping and otherwise protecting the railroad embankment, structures and transmission lines, but is the value of the easement condemned by the Government.

6. The burden of proof is upon the respondents to establish the value of such easement. There has been no competent evidence adduced on such issue, for which reason the jury should be instructed to return a verdict in the sum of One ($1.00) Dollar.

7. The United States is not liable for injuries which do not directly and proximately flow from the raising of the pool to elevation 660, but which may occur in the future by reason of the intervention of independent and natural forces. No recovery may be adjudged against the United States for the reconstruction or alteration of bridges or

culverts where the Railroad Company anticipates that its existing bridges and culverts will be rendered inadequate by reason of the future deposition of silt and debris conveyed into the Mississippi river from tributary streams. Such proof does not establish a taking but is addressed to the advent of a consequential injury which is damnum absque injuria.

For all of which reasons the Government respectfully submits that it is entitled to a directed verdict as above requested."

which was filed in this cause, denied in the Court nisi and to which an exception was duly noted.

Error No. XV.

That the Court erred in entering an order over the Government's objection dated January 3, 1936, which directed, inter alia, the payment of interest on the verdict of the jury, the portion of said order assigned as error being:

"Ordered that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the aforementioned respondents in the above entitled causes from August 4, 1934 to the date of entry of judgment in said causes, and that same be included in and be made a part of such judgment; further that after the entry of judgment in said causes, interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes."

to which order exception was duly noted.

Dated this 3d day of April, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
U. S. Attorney for District of Minn.
Daniel F. Steck,
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

[fol. 79] (Endorsed—Assignment Of Errors 459) Filed April 3, 1936, Margaret L. Mullane, Clerk, By Kathryn F. O'Connor.

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[fol. 80] (Assignment of Errors in Cases Nos. 460 and 461.)

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required for the Improvement of Navigation in the Mississippi River.

(Third and Fourth Condemnations)
(L/D No. 5—Minneiska)

File No. 460 At Law.
File No. 461 At Law

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents,

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain land in Wabasha County, Minn., containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

Now comes the United States of America, the Petitioner in the above entitled proceedings, in connection with and as a part of its Petition for Appeal herein, assigns the following errors, which it avers were committed by the District Court in its rulings, orders and instructions upon which the Petitioner relies to reserve the judgment entered herein.

[fol. 81] Error No. I.

That the Court erred in refusing to give the following instructions:

Government's Requested Instruction No. 2.

"You are instructed that with reference to the bridges and culverts, the Railroad Company asserts a claim for alteration of such structures. Insofar as the claimed necessity for such alterations is founded upon an anticipated deposition of silt and debris in such culverts and bridges, you are instructed that no recovery may be awarded where the testimony shows that the silt and debris is carried to the culverts and bridges by tributary streams which flow into the Mississippi river. The carriage of silt and debris by tributary streams is an independent, natural force over which the Government has no control, and for which it may be subjected to no liability. If you are satisfied by a fair preponderance of the evidence that the existence of the 660 pool created by Lock and Dam No. 5 contributes to the deposition of silt so carried by the tributary streams, and in such a manner as to clog the culverts and bridges of the Railroad Company, there would still be no right of recovery against the United States, since such an event is a consequential injury resulting from the pool which does not constitute a taking."

To which refusal exception was duly noted.

Error No. II.

That the Court erred in refusing to give the following instructions:

[fol. 82] Government's Requested Instruction No. 4.

"The liability of the United States in this proceeding is governed primarily by the Fifth Amendment to the United

States Constitution. That amendment provides that the United States, when it takes private property for public use, shall pay a just compensation therefor. The liability of the Government consequently arises only when private property is taken for public use, and excludes those situations where the property is merely damaged but not appropriated. A taking of the property occurs when by reason of some act of the United States the owner is directly ousted of his use and possession of the property. If the act of the Government does not so oust the owner, but inflicts upon his property an injury, the United States sustains no liability. Where it appears from the facts that the United States is improving a navigable river, as a result of which injury is inflicted upon adjoining lands, and the facts further disclose that by resorting to protective measures, the owner of such land can ward off the injurious consequences, no liability is thereby imposed upon the United States. The reason for such non-liability follows from the condition of the Fifth Amendment that payment of compensation is only required where the property is taken. Obviously the property cannot be said to be taken where, after the alleged taking, it remains in the use and possession of the owner.

"You are consequently instructed that in the case at bar, the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and of the Western Union Telegraph Company has not been taken as a result of the [fol. 83] raising of the pool and the condemnation of the easement to elevation 660 against the embankment and structures of the said Companies. The evidence discloses that by resorting to protective measures, the property of the Railroad Company and of the Western Union Company will remain in their full and complete use and possession to the same extent and as prior to the commencement of this condemnation suit, subject only to the concurrent use of a portion of the right-of-way to elevation 660 by the United States.

"You are instructed that the just compenastion therefor, to which the respondents are entitled, is the value of the concurrent usage by the United States of that portion of the properties of the said respondents lying within the limits of the easement condemned, and is not the sum of

money which will compensate the said respondents for the injury or damage done to their respective properties by reason of the presence of the pool water at elevation 660 above mean sea level datum."

To which refusal exception was duly noted.

Error No. III.

That the Court erred in instructing the jury as follows:

"For all damage directly and proximately caused to the Railroad Company and the Telegraph Company by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the government in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark and up to 660 feet above mean sea level, it must pay compensation for any damage that it does or for any taking."

To which exception was duly noted.

[fol. 84] Error No. IV.

That the Court erred in instructing the jury as follows:

"In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Government, the costs of adjusting the railroad structures and the telegraph structures so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place the Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking."

To which exception was duly noted.

Error No. V.

That the Court erred in charging the jury as follows:

"They (the respondents) are entitled to have the railroad property, including the culverts, bridges and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties."

To which exception was duly noted.

[fol. 85] Error No. VI.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owner of property along the Mississippi river has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right * * * and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent."

To which exception was duly noted.

Error No. VII.

That the Court erred in instructing the jury as follows:

"You are instructed that the right to have the water flow away from bridges and culverts extending through the railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage

occurs by reason of the water being raised in the Mississippi river above the level of ordinary high water mark. That is, this instruction that the property owner,—in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its [fol. 86] property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark."

To which exception was duly noted.

Error No. VIII.

That the Court erred in instructing the jury as follows:

"You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi river above the level of ordinary high water mark."

To which exception was duly noted.

Error No. IX.

That the Court erred in instructing the jury as follows:

"You are instructed that if the impounding of the waters of the Mississippi river by the construction of Lock and Dam No. 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embankments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation which said Railroad and Telegraph Companies are entitled to recover from the United States."

To which exception was duly noted.

Error No. X.

That the Court erred in instructing the jury as follows:

"There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said [fol. 87] flowage easement and all damages, present and

future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings."

To which exception was duly noted.

Error No. XI.

That the Court erred in denying the motion of the Government upon the opening statement of the respondents to instruct the jury to return a verdict in favor of the Government in each of the three cases now on trial in the sum of $1.00, upon the grounds that from the opening statement of counsel it appears conclusively there has been no taking of the railroad property within the meaning of the Constitution, and upon the ground that the only asserted claims are for consequential injuries which are not compensable in a proceeding of this character under the Fifth Amendment, and that the damages stated are wholly prospective, which motion was denied and an exception duly noted.

Error No. XII.

That the Court erred in overruling the government's offer of proof as follows:

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet; between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of the Railroad embankments at the above stated locations where the Government contends the Railroad embankments [fol. 88] are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States

Chief of Engineers other than is evidenced by the Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rhame, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation."

to which offer objection was made and which objection was sustained as follows:

"The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and an exception allowed."

Error No. XIII.

That the Court erred in denying the Motion of the United States to dismiss from the proceedings four segments of railroad property as follows: between stations 4990 plus 86.5 to 4978 plus 86.5 and between stations 4968 plus 86.5 to 4948 plus 86.5, between stations 4936 to 4927, between stations 4807 to station 4798; which said motion was duly filed in writing and incorporated in the record and made pursuant to a direction of the Secretary of War of the United States, a properly authenticated copy of which was filed in the proceedings, and to the refusal to grant which an exception was duly noted.

Error No. XIV.

That the Court erred in denying the Government's written motion as follows, to-wit:

"Motion for Directed Verdict.

"Now comes the petitioner, the United States of America, and respectfully moves the Court to peremptorily instruct the jury herein to return a verdict in favor of the respondents, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the Western Union Telegraph Company, in the sum of One ($1.00) Dollar for the reasons following:

[fol. 89] 1. The liability of the United States in this proceeding is limited by the Fifth Amendment to the United

States Constitution to the payment of compensation for private property taken for public use.

2. Property is taken within the purview of the Fifth Amendment only where the evidence discloses a direct invasion of the property of respondents directly resulting in an ouster of the owner's use and possession.

3. The United States is in no event liable for an injury to property which does not so result in an ouster of the owner's use and possession.

4. The United States is not liable for the cost of reconstructing or altering property for the purpose of restraining the flowage of water upon such property nor for the cost of reconstructing or altering property to withstand the injurious effects of water where the presence of such water, and in the absence of such protective measures, would not constitute a taking of such property.

5. Consequently, the true measure of the liability of the United States in this proceeding is not the cost of raising, riprapping and otherwise protecting the railroad embankment, structures and transmission lines, but is the value of the easement condemned by the Government.

6. The burden of proof is upon the respondents to establish the value of such easement. There has been no competent evidence adduced on such issue, for which reason the jury should be instructed to return a verdict in the sum of One ($1.00) Dollar.

7. The United States is not liable for injuries which do not directly and proximately flow from the raising of the pool to elevation 660, but which may occur in the future by reason of the intervention of independent and natural forces. No recovery may be adjudged against the United States for the reconstruction or alteration of bridges or culverts where the Railroad Company anticipates that its existing bridges and culverts will be rendered inadequate by reason of the future deposition of silt and debris conveyed into the Mississippi river from tributary streams. Such proof does not establish a taking but is addressed to the advent of a consequential injury which is damnum absque injuria.

For all of which reasons the Government respectfully submits that it is entitled to a directed verdict as above requested."

which was filed in this cause, denied in the Court nisi and to which an exception was duly noted.

Error No. XV.

That the Court erred in entering an order over the Government's objection dated January 3, 1936, which directed, inter alia, the payment of interest on the verdict of the jury, the portion of said order assigned as error being:

[fol. 90] "Ordered that interest at six per cent (6%) per annum be allowed on the verdict of the jury in favor of the aforementioned respondents in the above entitled causes from August 4, 1934 to the date of entry of judgment in said causes, and that same be included in and be made a part of such judgment; further that after the entry of judgment in said causes, interest be and hereby is allowed upon the judgment in said causes from the date of entry of such judgment to the date of payment of the judgment in said causes."

to which order exception was duly noted.

Dated this 10 day of August, 1936.

UNITED STATES OF AMERICA,
By George F. Sullivan,
U. S. Attorney for District of Minnesota.
Daniel F. Steck,
John J. Courtney,
John T. Harrington,
Special Assistants to the Attorney General.

(Endorsed)—Assignment of Errors 460, 461) Filed August 10, 1936, Margaret L. Mullane, Clerk, By Olive Davies, Deputy.

[fol. 91] (Mandate of United States Circuit Court of Appeals Directing Dismissal of Certain Lands in Condemnation From Appeal in Case No. 459.)

United States of America,—ss.:

The President Of The United States Of America,

(Seal United States Circuit Court Of Appeals, Eighth Circuit.)

To The Honorable The Judges Of The District Court Of The United States For The District Of Minnesota.—Greeting:

Whereas, lately in the District Court of the United States for the District of Minnesota, before you, or some of you in a certain cause between the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and certain land in Winona County, Minnesota; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Respondents, No. 459, At Law, wherein the judgment of the said District Court was entered on January 6, 1936, as appears from a certified copy thereof on file in the United States Circuit Court of Appeals for the Eighth Circuit;

as by the inspection of the Certificate of the Clerk of said District Court and of the certified copy of the judgment of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal allowed to the United States of America, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the May term, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause came on to be heard before the said United States Circuit Court of Appeals, and the following order was made, viz.:

United States of America, Appellant,

vs.

Certain lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel

P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Appellees.

The United States of America having appealed from a judgment in the sum of One Hundred Fifty-seven Thou- [fol. 92] sand Seven Hundred Forty-seven and 39/100 Dollars ($157,747.39), entered in the First Division, District of Minnesota, (File No. 459 at Law) for the condemnation of an easement over certain lands in Winona County, Minnesota, and a stipulation having been presented to this Court wherein and whereby the Appellant and the Appellees have agreed to segregate certain of the issues to be raised upon said appeal and to apportion the whole sum of the judgment rendered between the issues to be raised on appeal and those as to which there is now no controversy, by reason of decisions subsequent to this appeal, this Court having approved and accepted the stipulation of the parties on file herein,

It Is Ordered that the judgment aforesaid be and it hereby is vacated, set aside and reformed in the following manner and in the following respects, to-wit: That there be and hereby is dismissed from this said appeal, all of the lands in said condemnation proceeding aforesaid, save and except the following:

I. As to that portion of right-of-way in Lot 1, Section 7, Easterly of Railroad Station 4978+86.5 and Westerly of Station 4990+86.5 in Lot 1, Section 18, Township 108 North, Range 8 West of the 5th P. M.

II. As to that portion of land lying in Lot 2 of Section 7, Easterly of Station 4948+86.5 and Westerly of Station 4968+86.5 in Government Lot 1, Section 7, all in Township 108 North, Range 9 West of the 5th P. M.

III. As to that portion of right-of-way in Government Lot 2, Section 12, Easterly of Station 4927+00 and in Government Lot 3, Section 7, Westerly of Station 4936+00, all in Township 108 North, Range 8 West of the 5th P. M.

all situate in the County of Winona, State of Minnesota, and that the judgment of just compensation to be determined for the taking and condemnation of the lands herein dismissed from this said appeal shall be the sum of Eighty-four Thousand Nine Hundred Eighty-seven and 00/100 ($84,987.00) Dollars, as to which sum the District Court is directed to enter judgment, said judgment to bear interest at the rate of 6% per annum from December 9, 1934, until paid into the Registry of Court. Upon the payment of said sum with interest as aforesaid, the United States of America shall be entitled to a decree vesting in it title to the easement condemned save and except as to the lands in Areas I, II and III referred to above, and as to which jurisdiction is reserved on this appeal; and

[fol. 93] It appearing to the Court that during the pendency of this appeal, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company made application for reorganization under and pursuant to the terms of Section 77 of the Bankruptcy Act, upon which application Henry A. Scandrett, Walter J. Cummings and George I. Haight were appointed Trustees and that the railroad of said Railroad Company is now being operated by them pursuant to said act and appointment.

It is Ordered That the files, records and proceedings in this cause and in this Court, upon the entry of the judgment as directed in the Court below, be amended and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, be and they hereby are joined as additional parties in said proceeding.

Except as aforesaid jurisdiction of this Court over the appeal of the United States of America aforesaid, is retained by this Court as to the issues to be raised concerning the areas, and compensation therefor, hereinbefore referred to by metes and bounds. As to each of them this Court gives effect to the stipulation of the parties, dated June 16, 1938 and filed herein, to-wit: That the apportion of the judgment retained in this Court applicable to each thereof is as follows:

| | |
|---|---|
| As to Area numbered I above | $13,292.04 |
| As to Area numbered II above | $43,255.35 |
| As to Area Numbered III above | $ 3,810.28 |

and as to these portions this Court gives effect to the aforesaid stipulation of June 16, 1938, together with interest thereon at 6% per annum from December 9, 1934, as provided for in said stipulation; and

The parties having agreed to limit the issues to be raised upon appeal,

It Is Ordered that all Assignments of Error, save and except Assignments Nos. XII and XIII, be and they hereby are waived, together with that portion of Assignments which prays the reversal of the judgment, jurisdiction of which is expressly retained by this Court; and

Let a mandate issue forthwith for the entry of the portion of the judgment as reformed and affirmed herein.

Dated this 6th day of September, 1938.

[fol. 94] You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the order of the United States Circuit Court of Appeals, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 9th day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed):—United States Circuit Court of Appeals, No. 11,300. May Term, 1938. United States of America, Appellant, vs. Certain Land in Winona County, Minnesota, et al. Mandate. Let the within Mandate be filed and recorded and judgment entered thereon. Dated Sept. 10, 1938. George F. Sullivan, U. S. District Judge. Filed September 10, 1938. Margaret L. Mullane, Clerk. By Kathryn F. O'Connor, Deputy.

[fol. 95] (Mandate of United States Circuit Court of Appeals Directing Dismissal of Certain Lands in Condemnation From Appeal in Cases Nos. 460 and 461.)

United States of America,—ss.:

The President of the United States of America,

(Seal United States Circuit Court of Appeals, Eighth Circuit.)

To the Honorable the Judges of the District Court of the United States for the District of Minnesota.—Greeting:

Whereas, lately in the District Court of the United States for the District of Minnesota, before you, or some of you in certain causes between the United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and Certain Land in Wabasha County, Minnesota, containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents, and the United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner, and Certain land in Wabasha County, Minnesota, containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents, Nos. 460 and 461, At Law, Consolidated, wherein the judgment of the said District Court was entered on January 6, 1936, as appears from a certified copy thereof on file in the United States Circuit Court of Appeals for the Eighth Circuit;

as by the inspection of the Certificates of the Clerk of said District Court and of the certified copy of the judgment of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal allowed to the United States of America and a cross-appeal allowed to the respondents,

agreeably to the act of Congress, in such case made and provided, fully and at large appears;

[fol. 96] And Whereas, at the May term, in the year of our Lord one thousand nine hundred and thirty-eight, the said cause comes on to be heard before the said United States Circuit Court of Appeals, and the following order was made, viz.:

United States of America, Appellant,

vs.

Certain lands in Wabasha County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Appellees.

The United States of America having appealed from a judgment in the sum of Thirty-five Thousand Two and no/100 ($35,002.00) Dollars, entered in the First Division, District of Minnesota, (File Nos. 460 and 461 Consolidated) for the condemnation of an easement over certain lands in Wabasha County, Minnesota, and a stipulation having been presented to this Court wherein and whereby the Appellant and the Appellees have agreed to segregate certain of the issues to be raised upon said appeal and to apportion the whole sum of the judgment rendered between the issues to be raised on appeal and those as to which there is now no controversy, by reason of decisions subsequent to this appeal, this Court having approved and accepted the stipulation of the parties on file herein,

It Is Ordered that the judgment aforesaid be and it hereby is vacated, set aside and reformed in the following manner and in the following respects, to-wit: That there be and hereby is dismissed from this said appeal, all of the lands in said condemnation proceeding aforesaid, save and except the following:

As to that portion of land lying Easterly of Station 4795+00 in Government Lot 4, and Westerly of Station 4807+00 in Government Lot 5, all in Township 109 North, Range 9 West of the 5th P. M. Wabasha County, Minnesota

and that the judgment of just compensation to be determined for the taking and condemnation of the lands herein dismissed from this said appeal shall be the sum of Twenty-five Thousand, Two and 80/100 ($25,002.80) Dollars, as to which sum the District Court is directed to enter Judgment, said judgment to bear interest at the rate of [fol. 97] 6% per annum from December 9, 1934, until paid into the Registry of Court. Upon the payment of said sum with interest as aforesaid, the United States of America shall be entitled to a decree vesting in it title to the easement condemned save and except as to the land referred to above, between Railroad Stations 4795+00 and 4807+00, and as to which jurisdiction is reserved on this appeal; and

It appearing to the Court that during the pendency of this appeal, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company made application for reorganization under and pursuant to the terms of Section 77 of the Bankruptcy Act, upon which application Henry A. Scandrett, Walter J. Cummings and George I. Haight were appointed Trustees and that the railroad of said Railroad Company is now being operated by them pursuant to said act and appointment,

It is Ordered That the files, records and proceedings in this cause and in this Court, upon the entry of the judgment as directed in the Court below, be amended and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, be and they hereby are joined as additional parties in said proceeding.

Except as aforesaid jurisdiction of this Court over the appeal of the United States of America aforesaid, is retained by this Court as to the issues to be raised concerning the area, and compensation therefor, hereinbefore referred to by metes and bounds. As to said area this Court gives effect to the stipulation of the parties dated June 16,

1938, filed herein, to-wit: That the apportion of the judgment retained in this Court applicable thereto is as follows: $7,247.21 and as to this portion this Court gives effect to the aforesaid stipulation of June 16, 1938, together with interest thereon at 6% per annum from December 9, 1934, as provided for and in said stipulation; and

The parties having agreed to limit the issues to be raised upon appeal,

It Is Ordered that all Assignments of Error, save and except Assignments Nos. XII and XIII, be and they hereby are waived, together with that portion of Assignments which prays the reversal of the judgment, jurisdiction of [fol. 98] which is expressly retained by this Court; and

It appearing to the Court from said stipulation of June 16, 1938, that the Appellees herein have filed a cross-appeal and have presented a motion to the Court for the dismissal of said appeal, upon said motion

It Is Ordered That the appeal of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be and it hereby is dismissed.

Let a mandate issue forthwith for the entry of the portion of the judgment as reformed and affirmed herein.

Dated this 6th day of September, 1938.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the order of the United States Circuit Court of Appeals, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 9th day of September, in the year of our Lord one thousand nine hundred and thirty-eight.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed):—United States Circuit Court of Appeals, No. 11,301. May Term, 1938. United States of America,

Appellant, vs. Certain Land in Wabasha County, Minnesota, et al. No. 11,302 Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., Appellant, vs. United States of America. Mandate. Let the within Mandate be filed and recorded and judgment entered thereon. Dated Sept. 10, 1938. George F. Sullivan, U. S. District Judge. Filed September 10, 1938. Margaret L. Mullane, Clerk. By Kathryn F. O'Connor, Deputy.

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[fol. 99] (Stipulation For Preparation of Single Bill of Exceptions and One Transcript on Appeals.)

United States District Court, District of Minnesota, First Division.

U. S. Circuit Court of Appeals, Docket #11300.

United States of America, Petitioner-Appellant,
File No. 459. vs. At Law.
Certain Lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith, as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

and

United States of America, Petitioner-Appellant,
File No. 460. vs. At Law.
Certain Lands in Wabasha County, Minnesota, Containing 3140 acres; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company

and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

and

U. S. Circuit Court of Appeals, Docket #11301.

United States of America, Petitioner-Appellant,
File No. 461. vs. At Law.
Certain Land in Wabasha County, Minnesota, Containing 1960 acres; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, Respondents-Appellees.

[fol. 100] An appeal having been taken from a separate judgment rendered in file number 459, District Court of Minnesota, First Division, which said appeal is docketed as number 11300, and a separate appeal having been taken from a judgment rendered in files numbered 460, 461, consolidated District Court of Minnesota, First Division, which said appeal bears docket number 11301, and all of said cases having been tried as one by consent of the parties and subsequent to a rendition of the verdict therein, a separate judgment was entered; and

Since the said cases were tried as one the testimony contained in any proposed bill of exceptions would result in a large duplication;

Now, Therefore, It Is Stipulated And Agreed By and between the respective parties:

(1) That a single bill of exceptions and a single amendments to the bill of exceptions may by the respective parties be proposed as the bill of exceptions and amendments thereto to cover all of the above entitled cases and such bill of exceptions and amendments thereto may be filed insofar as they are duly allowed by the above entitled court

shall stand as and for the bill of exceptions in District Court files numbered 459, 460 and 461 and in Circuit Court of Appeals files numbered 11300 and 11301.

(2) That the transcript of the record in each of the above entitled cases may be printed as one transcript of record and be taken and considered as the transcript of record in each of the said appeals with the same force and effect as though separate transcripts of the record were filed in each of said appeals.

(3) That by entering into this stipulation, neither of the parties waives any rights concerning any issue of law which may be raised in either of the two separate judgments appealed from.

Dated this 4th day of August, 1939.

[fol. 101]

JOHN J. COURTNEY,
Special Assistant to the Attorney General of the United States.

JOHN T. HARRINGTON,
Special Assistant to the Attorney General of the United States.
Attorneys for Petitioner-Appellant.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Station,
Minneapolis, Minnesota.
Attorneys for Respondents-Appellees.

(Endorsed—Stipulation Combining Record on Appeal, 459, 460-461) Filed August 8, 1939, Thomas H. Howard, Clerk, By Lyle E. Anderson, Deputy.

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[fol. 102] (Order of United States Circuit Court of Appeals For Preparation of Single Bill of Exceptions and One Transcript on Appeals.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Monday, August 14, 1939.

United States of America, Appellant,
No. 11,300. vs.
Certain Lands in Winona County, Minnesota, et al.
Appeal from the District Court of the United States for the District of Minnesota.

and

United States of America, Appellant,
No. 11,301. vs.
Certain Lands in Wabasha County, Minnesota, et al.
Appeal from the District Court of the United States for the District of Minnesota.

In pursuance of the stipulation of parties and in accordance with the provisions therein contained, It is Ordered by this Court:

(1) That a single bill of exceptions and a single amendments to the bill of exceptions may by the respective parties be proposed as the bill of exceptions and amendments thereto to cover all of the above entitled cases and such bill of exceptions and amendments thereto may be filed and insofar as they are duly allowed by the said District Court shall stand as and for the bill of exceptions in District Court files numbered 459, 460 and 461 and in Circuit Court of Appeals files numbered 11300 and 11301.

(2) That the transcript of the record in each of the above entitled cases may be printed as one transcript of record and be taken and considered as the transcript of record in each of the said appeals with the same force and effect as though separate transcripts of the record were filed in each of said appeals.

(3) That by entering into the stipulation containing the foregoing provisions neither of the parties waive any rights concerning any issue of law which may be raised in either of the two separate judgments appealed from.

August 14, 1939.

A true copy.

Attest:

(Seal)
U. S. Cir. Court
of Appeals
Eighth Circuit

E. E. KOCH,
Clerk, U. S. Circuit Court of
Appeals, Eighth Circuit.

[fol. 103] (Endorsed—Certified Copy of Order of Circuit Court of Appeals Confirming Stipulation and Combining Record 459, 460-461) Filed August 17, 1939, Thomas H. Howard, Clerk, By Lyle E. Anderson, Deputy.

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[fol. 104] Bill of Exceptions.

United States District Court, District of Minnesota, First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Situate in the County of Winona, State of Minnesota, Required For the Improvement of Navigation in the Mississippi River.

(Second Cond. 32 Acres)
(L/D No. 5—Minneiska)

United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, Appellant,

File No. 459. vs. At Law.

Certain Lands in Winona County, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph & Cable Company, et al., Appellee.

(Notice of Proposed Bill of Exceptions and Service.)

To: F. W. Root, C. O. Newcomb and A. C. Erdall, Attorneys for the above named Respondents and Appellees.

Please Take Notice, that the under-signed proposes the following Bill of Exceptions:

UNITED STATES OF AMERICA,

JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General.

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Service of the within proposed Bill of Exceptions is acknowledged this 2nd day of August, 1939.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Appellee.

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[fol. 105] Bill of Exceptions.

United States District Court, District of Minnesota,
First Division.

In the Matter of

The Condemnation by the United States of America of Certain Lands Hereinafter Particularly Described, Situate in the County of Wabasha, State of Minnesota, Required For the Improvement of Navigation in the Mississippi River.

(L/D No. 5—Minneiska)
(Third and Fourth Condemnations)

File No. 460 At Law.
File No. 461 At Law.

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 3140 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

and

United States of America by Geo. F. Sullivan, United States Attorney for the District of Minnesota, Petitioner,

vs.

Certain Land in Wabasha County, Minn., Containing 1960 acres; Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the

Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Western Union Telegraph & Cable Company, et al., Respondents.

To: F. W. Root, C. O. Newcomb and A. C. Erdall, Attorneys for the above named Respondents and Appellees.

Please Take Notice, that the under-signed proposes the following Bill of Exceptions:

UNITED STATES OF AMERICA,

JOHN J. COURTNEY,
JOHN T. HARRINGTON,
Special Assistants to the Attorney General.

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[fol. 106] Be it Remembered That:

The above entitled cause, having in accordance with stipulation of the parties herein and by order of the above entitled court been duly transferred for trial to the Third Division of said court, and that said cause came regularly on for trial on the November, 1935, general term of the above named court, being the 12th day of November, 1935, at ten o'clock in the forenoon before the Honorable Joseph W. Molyneaux, one of the judges thereof, with a jury, at the Federal Building in the City of St. Paul, State of Minnesota.

There were present and appearing:

Messrs. John J. Courtney and John T. Harrington, Special Assistants to the Attorney General, on behalf of the United States of America, petitioner herein.

Messrs. F. W. Root, C. O. Newcomb and A. C. Erdall, on behalf of Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; United States Trust Company of New York as Trustees; Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees; The National City Bank of New York and William W. Hoffman, as Trustees; Chemical Bank and Trust Company and Howard B. Smith as Successor Trustees; Western Union Telegraph Company, respondents herein.

Thereupon the following proceedings were had, and testimony taken, with reference to the subject matter of this appeal:

ROBERT C. JOHNSON, a witness called in behalf of the Government, being first duly sworn, testified:

Direct Examination.

By Mr. Courtney:

I am in the employ of the United States Engineers at St. Paul and reside at Minneapolis, I am familiar with the property that is being acquired in the so-called Whitman Pool at Dam No. 5 and with the descriptions which are con- [fol. 107] tained in the pleadings filed in the four cases. Government Exhibits Nos. 1, 2, and 3 and 4 correctly portray the properties involved in these four suits as well as the property of the Milwaukee Railroad and of the Western Union Telegraph and Cable Company. Three of these maps are drawn on a scale of 1" equals 400 feet, while Exhibit No. 3 is on a scale of 1" equals 100 feet. (The original Government Exhibits 1, 2, and 3 were received in evidence and transmitted to the Circuit Court of Appeals by order of the District Court.) The Milwaukee Railroad on each of the maps is indicated between two heavy lines by a line made up of long dashes and two dots. Exhibit No. 1 refers to the first and second condemnation and embraces the property located in Winona County. Lock and Dam No. 5 is indicated on this map. The heavy black line shown in the area marked "river" indicates the location of the lock and dam but the earth dam is now shown. The river is indicated between two heavy lines showing the shore line at the date of the survey. The arrows indicate the direction the water is flowing. Areas shown in blue on Government Exhibits Nos. 1 and 2 indicate lands to be acquired by the Government in fee simple. These are private lands as distinguished from the Railroad. On Exhibit No. 2 the part shaded in gray represents the areas within the Government meander lines. The meander line located the river on a Government survey map. It shows the location about 1850, but not necessarily now as the river in some places has accreted and at others has washed away since that time. Descriptions of property, however, refer to that within the old meander lines.

Areas tinted yellow on Exhibit Nos. 1, 2 and 3 indicate land now owned by the United States. Exhibit 3 shows the town of Minneiska on a larger scale of one inch equals 100 feet. The Whitewater River empties into the Mississippi River right at Minneiska.

Without objection Government Exhibits Nos. 1, 2, 3 and 4 were received in evidence as a description of the property on which the Government seeks an easement.

Cross-Examination.

By Mr. Erdall:

[fol. 108] The part in yellow is land owned by the United States Department of Agriculture for game preserves and things of that kind. The gray color on Exhibit No. 2 indicates the present limits of the river. In 1848 when the meander line was surveyed the Minnesota side of the river ran somewhere near the meander line shown on the map. The meander line surveyed in 1929 on the Wisconsin side is also shown.

On Exhibit No. 1 the meander line is not shown.

Exhibits Nos. 2 and 3 cover lands located in Wabasha County and are in Condemnation No. 3.

The line extending out from the edge of the river on the Wisconsin side, No. 45, 44, 98, etc., are wing dams constructed by the Government. They are wing dams to maintain the channel in a certain position. The purpose is to keep the channel away from the shore. These two dams extend down on both sides of the river to the dam.

At Minneiska, shown on Exhibit No. 2 in blue, the Government is taking fee simple title to quite a large area on the river side of the Milwaukee Railroad. Extending from Minneiska to the Whitewater River near Weaver, the Government is taking fee simple title to lands from the railroad clear over to the Mississippi River main channel. The Government is also taking fee simple title to quite an area of land upstream from the Milwaukee Railroad on the Whitewater River.

Redirect Examination.

By Mr. Courtney:

The very small figures on the maps for example, on Exhibit No. 2, show spot elevations of the land. From these elevations one can tell if the land is level, rolling, flat, or rising.

LAWRENCE W. PALMQUIST, being first duly sworn upon oath testifies as follows:

Direct Examination.

By Mr. Erdall:

I reside at Minneapolis, Minnesota. I have been employed by the Engineering Department of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company since the fall of 1928. Prior to that time I took a partial course [fol. 109] in Civil Engineering at the University of Minnesota. I started in 1932 making investigations on the effect of the nine-foot channel project in the Mississippi River insofar as the railroad is concerned and worked quite extensively upon it in 1932 and 1933. In the years 1934 and 1935 up to the present time, I have spent all of the time on the river work. I made or have had prepared under my supervision certain maps, blueprints and photographs. Among these was a map showing the limits to which the water will cover the land in the vicinity of the Mississippi River after the water is raised to the normal pool level of 660 feet above mean sea level, being a definite sea level datum used by the Army Engineers in this project. Railroad Exhibit No. 1 is a large map on the scale of 1" to 400 feet, and is a tracing of government flowage maps for the area shown. The portion in blue is the land below the normal pool elevation of 660 feet mean sea level. It is a tracing from maps prepared by the United States Engineers. I believe there were thirty-five (35) government maps traced and they cover only the portion of the pool that will affect us most materially. The 660 contours on the Government maps show the land below 660. Near the bottom of the map there are a series of lines that show United States Highway, formerly State Highway No. 3 and now United States and State Highway No. 36, and the Milwaukee Railroad. Where no work is done or proposed to be done, the railroad is shown by a heavy black dashed line. There is shown in a heavy solid black line where riprap has or will be placed. Where we have or propose to raise the grade the black changes to a red line. The yellow on the map also shows the location of riprap placed or to be placed since the dam has raised the water against our

embankment. It shows the riprap placed or to be placed on account of the pool.

The Government earth dike extending from the dam to the high ground near Buffalo City, shown in the map by a pink color, is some 18,000 feet long. The yellow along the earth dike represents the riprap placed on the earth dike by the Government. They riprapped their dike on the pool face from the toe of the slope to the top of dike.

[fol. 110] Small figures on map such as "653.1" indicate spot elevation of the ground at that point above mean sea level, or 6.9 feet below pool level.

The arrow with the letter "N" indicates north on the map. At the northerly end the dike ties into ground higher than the top of the dike. The dike at that end is at an elevation of 672. At the site of the dam the top of the dike is 670 or 10 feet above the pool level and 12 feet above the pool level at the upper end.

In low flows very little water flowed through the Belvidere or Pomme de Terre slough, but it flowed principally between the two lines running more or less parallel. A great portion of the entire bottom lands between the Mississippi River and the Belvidere slough was quite heavily timbered with the exception of a few marshy tracts. All the land shown in blue was covered with timber. The trees range from 48" in diameter down to brush. Where the base of the tree was at an elevation of 662 feet above mean sea level or less, they were cut by the Government. Some exceedingly large trees were cut at slightly higher elevations. On the map the green spots indicate land that is at elevations of 659 to 659.9. The pink spots are spot elevations of 658 to 658.9, or 1.1 feet to 2 feet below pool elevations. At some places the water is two or more feet in depth and at some other places it is over 20 feet in depth.

Railroad Exhibit No. 1 received in evidence. (The original of Railroad Exhibit No. 1 has been transmitted to the Circuit Court of Appeals by order of the District Court and a copy thereof appears at the end of this printed record.)

On the map the large structures are indicated by red lettering and an arrow down to the location of the structures.

There are, I believe, eighteen (18) small pipe culverts that have or are being changed indicated in similar red letters. For example, L-545½ in the vicinity of L-82. These culverts shown in red have or are to be changed to protect them against the raise of the water.

[fol. 111] The Court: We will take a short recess at this time.

Witness indicates on Railroad Exhibit 1 the location of Minneiska, Weaver, Bridge L-84 and the County line near that bridge dividing Wabasha County and Winona County. Everything below the Mississippi river on the map is in the State of Minnesota. To the right of the county line is Winona County and to the left is Wabasha County. Whitman is a siding on the railroad approximately ½ to ¾ miles below the dam. Minneiska and Weaver are towns and have railroad stations there.

Railroad Exhibit 2 is a track profile of the railroad between a point 2.2 miles west of Weaver down to the dam and east as far as Whitman siding. Platted to mean sea level elevation. It shows the track elevation, ground line, pool elevation, high water lines and the work that has or is to be done. A profile is merely a line of the elevation at the base of rail of the track. This is a double track railroad through the area here involved, and profile is taken at base of rail at center line of the westward main line track. It is double tracked between La Crosse and Minneapolis, and part shown on profile is all double tracked and all belongs to the Milwaukee Railroad. Trains from Chicago to Minneapolis and the Pacific Coast use the westbound track, which is the one nearest the river and trains going east use the eastbound track. Some of the important passenger trains that operate over these tracks are the Olympian, Pioneer Limited, the Fast Mail, the Riverview, the Day Express, the Hiawatha and others. The last mentioned is one of the world's fastest trains. A large number of freight trains operate over those tracks and there are also mail trains. It is the main line between Chicago and the Pacific Coast. The profile map was prepared under my supervision, from field survey, office records and Government records as to water elevations taken from Government plats.

Railroad Exhibit No. 2 received in evidence. (The original Railroad Exhibit No. 2 has been transmitted to the Circuit Court of Appeals by order of the District Court.)

[fol. 112] The base of rail is shown on Exhibit 2 by the upper solid rather fine, black line, it is quite an even line, it crosses a very irregular line at times. The irregular line is the ground line prior to the construction of the railroad. The yellow lines represent the 1880 high water, the red line labeled "pool elevation" represents the pool of Dam No. 5 with which we are concerned, and is at the elevation 660. The broken brown line at the bottom of the sketch represents the low water of 1933 which was one of the lowest stages in the Mississippi River in this area. That line extends from the dam to a point near the mouth of the Whitewater River at the town of Minneiska. At the time of the survey the main channel of the Mississippi River at Minneiska goes away from the railroad toward the Wisconsin side of the Mississippi River as shown on Exhibit 1.

The sketch on the top of the profile is drawn on a vertical scale of one inch equals 20 feet, whereas the horizontal scale is one inch equals 400 feet. The lower sketch is merely an illustration to show locations of towns, culverts, the fact that track is straight or curved the dashed line shows the railroad is running on a curve and the solid line represents straight or tangent tracks.

The railroad stationing is important as it determines [fol. 113] the limits of the riprap. By a station we mean a 100 foot stretch of track or embankment. Two or three stations of work means 200 or 300 feet of work.

The dam is at track stations 5013 plus 74 which means it is 74 feet beyond station 5013. For example, between station 5000 and 5010 there is 1000 feet. On the profile the small square or one inch horizontally represents 100 feet. The large squares of 1000 feet apart. The series of parallel lines show the river in the natural state. For example, between Station 4970 to 4900 the river is some distance away from the railroad and between Station 4860 and 4890 it is closer. On the sketch or map below the profile the yellow coloring represents riprap to be placed on the embankment. On the upper side of the track the yellow represents riprap placed or to be placed on the river

side of the railroad and below the track yellow indicates such riprap on the landward or bluff side of the track. The profile shows the location where the work has or is to be done both as to riprapping and bridges. The L-80 and L-84 have been changed and L-82 and L-90 are to be changed. Culverts L-[illegible] and L-84 have been replaced by bridges. The track has been raised near Culvert L-80 and it is shown by the red line above the original block track elevation.

Whitman is at the extreme right of Exhibit 2.

Direct Examination (Continued.)

(Palmquist)

By Mr. Erdall:

When we refer to east on our railroad we mean downriver, and west is upriver. Those are time table directions. The ground line shown on Railroad Exhibit 2 was taken from a blueprint of the construction profile and placed upon the tracing for Exhibit 2. The profile for the westbound main track shown on Exhibit 2 is based on elevations run by myself. The profile of the ground line, of course, only shows elevations along a definite line, it does not show what the ground elevation would be 2 feet or 10 feet off the line. I was unable to find the original cross sections.

[fol. 114] A cross section represents the outline of the embankment. It is the view you would get if you were to slice off or take a section out of it. On the cross-sections numbers increase going downstream. The cross sections were prepared by me from a field survey made in the fall and winter of 1933. There has been no change since that time in the railroad structures, embankments and bridges in that area.

The purpose of the cross sections is to show the present situation, or the situation before the water was raised, and what is to be done to protect the railroad against the water.

The black lines represent the outline of the actual cross sections. Green indicates bank widening to be done. Red indicates track to be raised. Yellow indicates riprap to be placed. For practical purposes the black line is the present outline of the embankment. Green is bank widen-

ing. If it is necessary to raise the track then the embankments must be widened to support the shoulder. A shoulder is necessary to support the ballast and roadbed.

The pool elevation means the surface of the water after the dam has backed the water upstream in the Mississippi River and the tributary waters. A lake will be formed, the surface of which will be 660 feet above mean sea level.

The railroad's contention is that it is necessary for them to riprap to protect their embankment to a point seven feet above the pool or up to the elevation of 667 feet above mean sea level.

Cross-Examination.

By Mr. Courtney:

Q. Mr. Palmquist, referring now to Railroad Exhibit 2, on this Exhibit 2—we will hold it this way so everyone can follow—in tracing out this line there are heavy black lines indicated as—what I have reference to is an unbroken black line. A. Yes.

Q. I am tracing it now at your station approximately L-599. Now, what does that indicate?

A. That indicates—oh, the irregular line?

[fol. 115] Q. Yes.

A. The irregular line indicates the ground line at the time of construction.

Q. That then was the elevation of the natural ground as you proceeded to build your track?

A. Yes, so far as we could ascertain.

Q. Now from what source did you get the data which is shown in this particular?

A. From the print of the construction profile.

Q. From the print of the construction profile?

A. Yes.

Q. And the broken lines that are indicated here, following along in the same general up and down fashion—they are broken lines—I am coming now in the vicinity of L-615—what does that broken line represent as distinguished from the black solid line?

A. The broken line which you have described or questioned represents the same situation.

Q. What do you mean, the same situation?

A. Well, I might explain in this way, that this railroad was once a single track railroad, and now it is a double

track railroad, and where the double track line followed the single line—I believe there is a note at the extreme right of this exhibit which shows or explains that situation. The ground line shown on the profile is the natural ground line under center line of the eastward main line, the dotted line as originally located for single track, and if followed as the eastward main line, solid line is relocated.

Q. Well, Mr. Palmquist, what I am endeavoring to ascertain from you is this: does this line, this irregular line, indicate the location of a natural ground elevation under the present railroad embankment?

A. As nearly as we can ascertain.

Q. That is, every record which you have, indicates that by following this irregular line, both the solid line and the broken line, you could point down from the center line of your present embankment and determine what the eleva-
[fol. 116] tion of the natural ground was—is that right?

Mr. Erdall: I have no objection, your honor, but as I understand, this is based upon the profile alone, or are there other records supporting it?

The Witness: The only record I have to support it is the print of the construction profile, and from that, that would answer your question "Yes."

Q. Well, the answer then to the question is "Yes," that you can take this elevation shown at any point on this irregular line projected down from the base of tracks and ascertain the elevation of the natural ground at that point?

A. Yes, I believe that is correct.

Q. Now does this profile indicate in any way where you have cut banks? A. Yes, I believe it would.

Q. Will you step over here, and illustrate to the jury and to the Court where those points are located?

A. Well, the cut, that is, a cut if you please—that is the way I would explain it—

Q. Call it a cut then.

A. Is indicated where this irregular line comes above the base of rail. However, there may have been some side-hill cut where it does not appear that way. This line is at the center line of the east bound track, and in turning this

around, one way or the other, it may not be entirely the same.

Q. Now, then, roughly, at a point on this map indicated at L-527, you have indicated on this profile a dip in the natural ground line under your embankment? A. Yes.

[fol. 117] Q. As constructed? A. Yes.

Q. You have indicated here a line which you call ordinary high water. That is this irregular line to which I am now pointing. That is correct, is it not?

A. Yes, I believe that is right.

Q. Now under this 527, and within this area which I am now outlining on the black, how much of a depth of water would there be if the water were maintained at the elevation you call the ordinary high water?

A. Well, this is in the water-course you understand of L-527, and at that place there it would have been, oh, 7, possibly a little bit better—or eight feet in depth.

Q. At that point there would have been eight feet of water. Now if you proceed up to the vicinity of L-80 at the point which I am now outlining with my pencil, where the black line goes down under the track in this fashion, how much of a depth of water would there have been at that point if the water had been maintained at the line you have marked as the ordinary high water mark?

A. Well, roughly—well, I think there might have been about 16 feet of water there.

Q. About 16 feet of water?

A. That is the maximum at the lowest point.

Mr. Erdall: What station is that?

The Witness: Well, that would be—at Station 4964.

Q. Will you indicate for the record only, the stationing at L-527?

A. The stationing at L-527, at Culvert L-527, is 4984 plus 12. However, the point about which you questioned me as to the height was at station 4987 plus about 20.

Q. The place where you said there would be nine feet of water? A. No—it is somewhere between 7 and 8 feet.

Q. Now then, as you pass over and through the line that is marked with the symbol of structure L-80, which I [fol. 118] think I can indicate here, the natural ground rolls

somewhat, and at that point the ordinary high water is, or the high water mark practically intersects and passes through what you claim was the natural ground—is that right?

A. Yes, it is very close to that line. Both lines are very near each other.

Q. Now then, coming over to this point here, to which my pencil is now directed, what station is that approximately? A. That is 4952.

Q. If the water had been raised and was maintained at the mark you call the ordinary high water mark, how much of a depth of water would there have been between the high water line and the ground line as indicated on the profile?

A. Between the ground line and the ordinary high water line as shown on this profile, it would have been somewhat over six feet.

Q. About six feet of water. Now, Mr. Palmquist, just one further question. Will you step down before the jury again please. I am indicating now the portion of this profile in the vicinity of culverts 601, 599 and 595, or between station—will you call them off?

A. Do you want those culvert designations?

Q. No, refer to the low points in this elevation.

A. Well, at the lowest point there it runs within a foot there. If you will point to that again, Mr. Courtney—

Q. Right there.

A. All right—between Stations 4796 plus 50 and 4799 plus 50—I think that hits the two low spots.

Q. On either end of that projection of the line it is within a foot of the center—is that right? A. Yes.

Q. How much of a depth of water is there at that point and between those stations, or would there be if the water [fol. 119] were maintained at the ordinary high water mark as you have shown it on this Exhibit 2?

The Court: You are referring to the high water mark of the natural river?

Mr. Courtney: Yes, your Honor.

The Court: Under natural conditions?

Mr. Courtney: The way Mr. Palmquist has reproduced it on Exhibit 2. That is, he has established a line which he says is the high water line or ordinary high water mark. That is shown on this profile, and I am asking now for the depth between that line and the lower limits of the natural ground as shown on Exhibit 2.

A. A little over six feet.
Q. About six feet of water? A. Yes.

The Court: In speaking of high water, you are speaking of the high water line before the dam was built?

Mr. Courtney: Yes, your Honor.

Mr. Erdall: Are you speaking of the high water line or the ordinary high water line?

Mr. Courtney: I am speaking about the ordinary high water mark or the line of the ordinary high water mark.

The Court: Before the dam was built?

Mr. Courtney: Before the dam was built.

Q. Now, Mr. Palmquist, your original construction profile was based on elevation from 1 to 70, or some such basis as that; that is, you used an arbitrary zero, and carried up from that to 75 or 80—is that right?
A. Yes, that is right.
Q. That is, as your original construction profile appears, it would be necessary to use some equation in order to transfer the elevations shown on your track profile to terms that would be the equivalent of mean sea level such as we are using it here? In other words, the elevation 73 as shown on your construction profile would be what in terms of mean sea level datum.
[fol. 120] A. Well, that is office data that I did not bring along, but I can find it for you. I haven't it here, although I have testified to it previously.
Q. You have testified to it? A. Yes.
Q. In other words, you add some figures to 73 or 70, as the case may be, on your construction profile, and from that

you derive the equivalent or the mean sea level for the same elevation at the same point?

A. Yes, you use an equation to arrive at the mean sea level elevation.

Q. You will get it for us sometime will you?

A. Yes, I will.

Q. Now have you, Mr. Palmquist, the construction profile of the railroad which you have reproduced on this Exhibit 2, as indicating the original ground line?

A. No, I haven't that, although the Government had such a print that is identical with it. I haven't our print here.

Q. That is, our print is identical with yours?

A. I believe so, I would tell of course upon seeing it and having an opportunity to check back from the one that I used or referred to on this Exhibit 2, of course. The Government is cutting all trees that were not more than two feet above the pool elevation. The stumps were cut off at the normal height.

Between mile lines 5 and 8 the water depths will run from 2 to 5 feet but the average would be considerably over two feet. A good portion of that was densely covered with wood.

By Mr. Courtney:

This pool is called the Whitman pool, or Pool 5. The dams are numbered downstream from the Ford Dam. The Ford Dam is Number 1, Hastings is Number 2, Red Wing Dam not yet constructed will be Number 3, the Alma Dam is Number 4, and this dam is the Whitman Dam Number 5. Dam Number 5 is about four miles below or south of the Town of Minneiska.

[fol. 121] Since this lawsuit was started, and in May, 1935, we commenced the use of some faster passenger trains. Because of this we super-elevated the curves between St. Paul and Chicago. We had trains as fast as these passenger trains and are still running these mail and express trains. They have added ballast between St. Paul and Chicago as a regular maintenance procedure.

Q. Well, Mr. Palmquist, just before we leave this railroad Exhibit 2, I believe that the record is not complete on

it. On Friday we were referring to the points between the lines which you have marked the ordinary high water mark and the original ground line, and we were indicating the depth of water at those various points. Now so that the Court and jury may understand it, the ground line that you referred to on this Exhibit 2 is on the landward side of the railroad—is that correct?

A. No, it is not.

Q. It is under the eastbound main, isn't it?

A. That is right.

Q. Well, isn't that the landward side of the embankment?

A. No. The embankment goes to the toe of the slope, which would be further landward than the center line of the track.

Q. That is true, but so far as the elevations here shown, they are nearer the land than they are the river?

A. I believe that is the fact.

Q. Well now, we omitted one point, Mr. Palmquist, in the vicinity I believe of L-82, at this point. Now will you point out to the jury; call [of], if you will please, the stationing. A. That would be 4833 on this line.

Q. 4833 at the low point. Assuming the water were maintained at the line which you indicate as being the high water mark, how much water would there have been at that point?

Mr. Erdall: Assuming the river water could get to that point?

[fol. 122] Mr. Courtney: I am not making any assumptions on that at all.

A. Approximately two feet between the ground line and the ordinary high water elevation at that point.

Q. About two feet of water at that point. Now on the scale to which this railroad Exhibit 2 is drawn, where are the elevations indicated? Are they at the top of the line or are they at the base of the line? On the scale at which this exhibit is drawn, isn't it a fact that the lines are indicated to cover the elevations of approximately one foot?

A. Yes, I believe that is true.

Q. Well, where are the actual elevations shown, at the top of the line or at the bottom of the line?

A. Well, as near as it might be platted, I would say at the center of the line.

Q. You would say at the center of the line? A. Yes.

Q. What is the equation?

A. The equation between the Railroad construction datum and the mean sea level datum, which was part of the adjustment which we are all using in this case, is 592.69.

Q. 592.69? A. Yes, sir.

Q. In other words, Mr. Palmquist, on that exhibit which was here identified by you as the original construction profile, and has been marked Railroad Exhibit 2, the elevations are shown in numbers from 1 to 80, that is to say, for example, at Station or at Culvert L-487, that elevation is shown as 75 plus 30. Well, now, tell us just how you employed that equation that I asked for a moment ago, in reconciling that profile with the mean sea level datum that we are using here?

A. We add what is shown on the profile which you just referred to, to the equation figure, which I just gave you, —592.69,—I believe that was it.

[fol. 123] Q. You know we used the figure 73 plus 30, as shown on that exhibit.

Mr. Erdall: (Interrupting) 75 plus 30.

By Mr. Courtney:

Q. Well, at 75 plus 30, or you would add 75 plus 30 as shown on that Exhibit 2 to the figure 592.69, and that would give you the mean sea level datum?

A. Yes, to make it simpler, maybe you could use 592.7; that would simplify matters.

Q. 592.7? A. Yes, that is 1/1000 of a foot.

Q. Now, this reconcilement of datum was made when, Mr. Palmquist, so that the Court and jury may understand how this equation happened to be coming into use; when was it made; just tell us the circumstances, if you please.

A. Well, I believe it was somewhat over a year ago that we definitely established the equation.

Q. Somewhat over a year ago? A. Yes, sir.

Q. Well, now, Mr. Palmquist, in describing all of the elevations that are used here, the main sea level datum,

the Government has established from time to time what is known as benchmarks, is that correct?

A. Yes, sir.

Q. And they are established at various fixed points up and down the river, and for that matter, over the whole country?

A. I believe that is correct.

Q. So that you can, when you are surveying, run your line over that known benchmark or elevation, isn't that right? A. That is what is usually done, yes, sir.

Q. And then the Government published the figures indicating what the corresponding mean sea level datum is at that particular benchmark, for example, for one, it may be 655, is that right?

[fol. 124] The Court: And by benchmark, you mean the elevation at that point above sea level?

Mr. Courtney: That is correct, Your Honor.

The Court: And you are starting this case at the Memphis, Tennessee, benchmark?

Mr. Courtney: Yes, the mean sea level datum.

The Court: Oh, the mean sea level datum.

The Witness: In other words, by a benchmark we usually refer to it as a permanent reference point.

By Mr. Courtney:

Q. Then there are several within these reaches of the river provided by this exhibit? A. Yes.

Q. So that you can go to any one of these points, and from that run your line? A. That is right.

Recross Examination.

By Mr. Courtney:

The purpose of wing dams is to keep a deep channel. In the past at some seasons of the year, navigation has stopped because of lack of water.

Redirect Examination.

By Mr. Erdall:

The wing dams all along the river have caused silting behind or downstream from the wing dams.

Witness excused.

Lawrence W. Palmquist (Recalled)

I have a record which shows the date when certain wing dams were constructed by the Government. The wing dam immediately upstream from L-84 is wing dam number 99. It was constructed in 1918.

---

Summarized Statement of Portions of Evidence Relating to This Appeal.

That R. J. MIDDLETON, Assistant Chief Engineer of the Railroad Company, ADOLPH MEYER, FRANCIS C. SHONEHON, witnesses for the Railroad and Telegraph Companies, and JAMES A. GRANT, EARL D. YARCHO and LEROY K. SHERMAN, [fol. 125] witnesses for the Government were each graduates of engineering schools and each had a broad experience in engineering matters which well qualified them to express opinion as to the necessity for protecting the Railroad Company and the Telegraph Company as against increased ice and water action caused by the construction and operation of Lock and Dam No. 5.

Mr. Middleton had a very broad experience in railroad designing, construction and maintenance along, in and over navigable waterways and some similar experience as to structures not owned or operated by railroads.

Mr. Yarcho had also had considerable experience in railroad designing, construction and maintenance and in construction and designing of various government structures and facilities along, in and over navigable waterways.

Mr. Meyer, Mr. Shonehon, Mr. Grant and Mr. Sherman were all engineers, specializing in hydraulic engineering with a background of experience over a wide territory. They each, in their testimony, disclosed a record of substantial experience and accomplishment in their engineering profession.

They were each well qualified to testify as to the effect of raising the water levels in the Mississippi River to the normal pool level and the effect of such pool, and the ice

and waves forming thereon, upon the Railroad and Telegraph properties.

The testimony of Mr. Middleton, Mr. Meyer and Mr. Shonehon on behalf of the Railroad Company and the testimony of Mr. Grant, Mr. Yarcho and Mr. Sherman on behalf of the Government, in many respects was not in dispute. Therefore, to avoid repetition, the testimony of all said witnesses on certain matters is set out.

They each testified in substance that they had individually inspected and made a study of the Mississippi River, its tributaries, along Pool 5, including the watersheds from [fol. 126] which water flowed through Railroad culverts and bridges into the Mississippi River in the area to be covered by Pool 5. Such study was made by each of them both prior and subsequent to the raising of water levels in the river by the operation of Lock and Dam No. 5.

They each testified they had examined the various exhibits introduced in evidence.

They all had individually in the past observed, investigated and made a study of the effect of wave, ice action and saturation of embankments including Railroad embankments upon bodies of water similar to the Mississippi River in its natural state as well as along bodies of water similar to the new artificial pool or lake known as Pool 5. That such studies included contraction and expansion of ice upon such bodies of water, the movement of loose or broken ice by wind and current and the effects thereof upon embankments and structures similar to those maintained by the railroad along the river in the area to be covered by Pool 5. Such studies also included the effect of permanent and temporary saturation of railroad embankments and the ground upon and in which Railroad and Telegraph structures and facilities rested or were located.

In the development of nine-foot navigation in the Mississippi River from Minneapolis to St. Louis, there are twenty-seven locks and dams. The first was built in 1910 or 1912 and is known as the Twin City Lock and Dam. Dam No. 2 is at Hastings. Dam No. 3 at Red Wing. Dam No. 4 is at Alma, Wisconsin. Dam No. 5 is the Whitman Dam

that we are dealing with in this particular case. Dam No. 5A will be just above Winona.

Earlier the Mississippi River was not developed as a slack water stream in navigation, but the way they managed to move boats at all was to combat the river channel by contraction work or wing dams, so that all the flow of the stream was placed in one deeper channel of the river. The wing dams shown on these maps had to do with this [fol. 127] concentration of the current, so that the higher velocities would wash the sediment further downstream and maintain the same depth so that we could have some navigation. Whatever water flows it is expending water-power and the higher velocities would wash the silt into the deep holes, if there are any. Anything that would restrict the channel between the ends of the wing dam would be helpful to navigation.

Now, the present scheme is slack water navigation; that means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes; it is a series of twenty-seven or more lakes, in addition to Lake Pepin. Lock and Dam No. 5 is built a short distance above the siding known as Whitman, and it is some times called the Whitman Dam and some times the Minneiska Dam. Officially, it is known as Dam No. 5. Where they chose the site of the dam, the width of the river, when the river was in flood and up to elevation 660, which is our pool level, the river was two miles wide from the Minnesota shore to the 660 contour on the Wisconsin side. On the Minnesota side of the Dam, there is a level esplanade, then a guide wall, a ship lock, and provision for a second lock known as an auxiliary lock. Then there are six roller gates and then twenty-eight tainter gates. A tainter gate is hung and opens up on a hinge or pivot. A roller gate rolls up. Beyond the tainter gates there is a dike shown on Exhibit 1 extending in a northwesterly direction upstream to an angle, then turning and terminating on the higher ground on the Wisconsin shore. This was so constructed apparently to prevent damage to valuable land below the dike as well as to the Burlington Railroad. The dike which

goes upstream at the angle is what is known as the bottle-neck. The whole narrowed space is the bottle neck and the Dam itself is the stopper. The dike is a massive structure. [fol. 128] The top elevation of the dike at the Dam is ten feet above the pool or above the 660 elevation and 3.4 miles upstream where it ties into the high ground on the Wisconsin side, the height of the dike is twelve feet above the pool. Sometimes there will be a head of fourteen feet against the Dam, that is, the water will be fourteen feet higher than on the other side. At extreme flood state, the water will be about one foot higher above than below the Dam. Now, when you narrow a river up as you have done in this bottle neck, the slope is greater than in a state of nature, because the water must run swifter through there. There was an additional slope of .7 of a foot.

The railroad witnesses above referred to all testified it is necessary to strengthen and support the railroad embankment in order to get flatter slopes and to get rock protection on the face of the embankment up to an elevation of at least seven feet above the pool and in the bottle-neck it should be carried higher.

## Telegraph and Signal Lines.

During the trial, it was stipulated that the Western Union Telegraph Company and the Railroad Company would present a joint claim for the signal and telegraph line changes and protection and after the trial would make their own allocation as between such companies out of the total amount allowed by the Court and jury for such signal and telegraph line changes and protection.

The testimony of LESLIE B. PORTER, Assistant Superintendent of Telegraph for the Western Union Telegraph Company and the Railroad Company as well as Signal Engineer for the latter, C. A. SANDBERG, Chief Lineman for the Railroad Company and R. J. MIDDLETON in behalf of the Railroad Company and the Telegraph Company, and JAMES A. GRANT and EARL D. YARCHO in behalf of the Government disclosed the following facts:

[fol. 129] The telegraph line was on the river side of the railroad tracks along Pool 5 and the railroad signal line was located on the bluff side of the tracks. The railroad

telegraph line carries the Dispatcher's telephone and its telephone message circuits. They are important trunk lines of the railroad and Western Union Telegraph Company. The Dispatcher's telephone is used to direct the operation of trains over those tracks. There are twenty-two wires on the telegraph line and three to twelve wires on the signal line.

The signal line adjacent to Pool 5 is used for the operation of automatic block signal and train control system. The automatic block signals indicate the condition of the track ahead. The train control system causes corresponding indications to appear in the cab of the engine. The River Division of the Railroad including the particular track here involved, is the only place on the system having the automatic train control system. This signal line is very important in the daily operation of the Railroad and governs the trains in that territory. It is a busy stretch of railroad, being the mainline between Chicago and the northwest. The Western Union Telegraph lines are used for the operation of news and market service and for the transmission of commercial messages, government reports and all of the usual message business. It is an important railroad telegraph and telephone system. It is the main line of the Western Union Telegraph Company between Chicago and the Twin Cities. Any interruption in service would be serious to the Telegraph Company in their market service, news service, press reports, ticker service and commercial messages.

All of the witnesses mentioned testified the telegraph line needed protection against wave and ice action on the raised water of the new pool impounded by Lock and Dam No. 5 and because of saturation of the bank in which some [fol. 130] of the poles rested, such saturation also being caused by the raised water levels.

The railroad witnesses also testified the telegraph pole line and guy wires supporting same would interfere with and be endangered by the riprapping of the embankment of the Railroad on the river side of the tracks. The railroad witnesses testified the telegraph lines should be moved to the bluff side and consolidated with the signal lines.

The Government witnesses testified the telegraph line should remain on the river side of the railroad tracks but should there be protected against the new pool level.

The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.

The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner after the raising of the water to pool level as they were operated under natural conditions of the Mississippi River. They testified that changes or protective measures had to be taken as to the signal telephone and telegraph lines but the amount and character of such changes and protective measures were in dispute. All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the [fol. 131] heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

The Railroad witnesses testified in their opinion this should be accomplished by quarry run rock dumped on the embankments to an elevation of seven feet vertically above normal pool level.

The Government witnesses testified in their opinion hand-placed riprap to an elevation of five feet vertically above normal pool level would be sufficient.

They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation.

Culverts and Bridges

Culvert L-595 was a 20-inch iron pipe about 132 feet long and L-599 was a cast iron pipe about 120 feet long. The testimony was undisputed that the artificial raising of the water to the normal pool level made it necessary to reconstruct Culverts L-595 and L-599 at Minneiska and the cost of doing such work was agreed to by the parties prior to submission of same to the jury.

Culvert L-527 was a 42-inch cast iron pipe 92 feet long. L-80 was a concrete culvert 8 feet by 16 feet and 134 feet long. L-82 a concrete bridge as is shown. The testimony was undisputed that Culvert L-527 and L-80 and Bridge L-82 were adequate under natural water levels and flows in the Mississippi River and its tributaries, but would not be adequate when the water in the river had been raised to normal pool level of 660 feet above mean sea level. Culvert L-527 would be submerged, L-80 nearly submerged by the proposed pool level of 660 and the water level substan- [fol. 132] tially raised under Bridge L-82. The raised water levels would make these culverts and bridge less efficient than formerly. The formation of ice in the culvert and under the bridge and the deposition of silt and debris under the new pool conditions would [lesses] or destroy their effectiveness. That the raising of the water to normal pool level by the operation of Lock and Dam No. 5 made it necessary for the Railroad to reconstruct said culverts or to substitute new culverts or bridges therefor to provide for the raised water levels. The proper and economical method of making such reconstruction or substitution and the cost of same was in dispute but no longer is in same by reason of the stipulation of the parties.

MR. R. J. MIDDLETON, MR. L. B. PORTER, MR. A. E. LODGE, on behalf of the Railroad, and MR. EARL D. YARCHO, on behalf of the Government, testified fully as to the reasonable cost of all of the protective measures herein involved.

Competent and sufficient evidence was introduced by the Railroad Company and the Government to support and sustain the verdict as to the need for protecting the property of the Railroad and Telegraph Companies under the new changed conditions and to sustain the verdict as to the amount thereof as to each item of damage (included in this appeal) claimed by and allowed to the Railroad and Telegraph Companies by the jury.

The character, amount and necessity for the measures taken to protect the Railroad and Telegraph Companies from the water raised and impounded by Lock and Dam No. 5 and the reasonable cost of such protective measures is not in issue on this appeal by reason of the stipulation of the parties. For the convenience of the court said stipulations so far as material are set out below. For that reason, the voluminous testimony showing the actual protective measures taken and the cost thereof has been omitted in this Bill of Exceptions.

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Stipulation of June 16, 1938, United States Circuit Court of Appeals, Eighth Circuit.

Still in appeal—Winona County, No. 459.

I.

That portion of right of way in Lot 1, Section 7 easterly [fol. 133] of Railroad Station 4978+86.5 and westerly of Station 4990+86.5 in Lot 1, Section 18, Township 108 North, Range 8 West of the 5th P. M.

II.

That portion of land lying in Lot 2 of Section 7, easterly of Station 4948+86.5 and westerly of Station 4968+86.5 in Government Lot 1, Section 7, all in Township 108 North, Range 9 West of the 5th P. M.

III.

That portion of right of way in Government Lot 2, Section 12, easterly of Station 4927+00 and in Government Lot 3, Section 7, westerly of Station 4936+00 all in Township 108 North, Range 8 West of the 5th P. M.

All situate in the County of Winona, State of Minnesota.

It is further stipulated and agreed that as to area Number 1 above, that the portion of the judgment applicable thereto is as follows:

| | |
|---|---|
| Riprap 5918.3 cu. yds. at $1.66209 | $9,836.74 |
| Culvert L-527 | 2,982.47 |
| Tel. and Tel. | 472.83 |
| Total | $13,292.04 |

That as to area numbered II, the portion of the judgment applicable thereto is as follows:

| | |
|---|---|
| Riprap 8630.0 cu. yds. at $1.66209 | $14,344.83 |
| Bridge L-80 | 28,122.46 |
| Tel. and Tel. | 788.06 |
| Total | $43,255.35 |

That as to area numbered III, the portion of the judgment applicable thereto is as follows:

| | |
|---|---|
| Riprap 2079.1 cu. yds. at $1.66209 | $ 3,455.65 |
| Tel. and Tel. | 354.63 |
| Total | $ 3,810.28 |

It is agreed that the sums of money representing the various expenditures and claims in areas I, II and III represent the fair and the reasonable cost of adjusting the structures and right of way of said Railroad Company within the areas so delineated and described, and each item thereof.

[fol. 134] It is stipulated and agreed that hereafter, either on appeal or in a new trial, as to one or all of the areas numbered I, II and III, the sums set forth shall be deemed to be the fair and reasonable cost of the above referred to.

It is stipulated and agreed that if the Court shall give effect to this stipulation, the appellant waives all assignments of Error except assignments Nos. XII and XIII and that portion of the assignments of Error which charges error in the entry of judgment thereon.

This stipulation was approved by the Court in September, 1938. The original stipulation in full with the map marked "Exhibit A", 'At Law No. 459', is on file with the Circuit Court of Appeals and a copy of said map on a reduced scale is reproduced herein.

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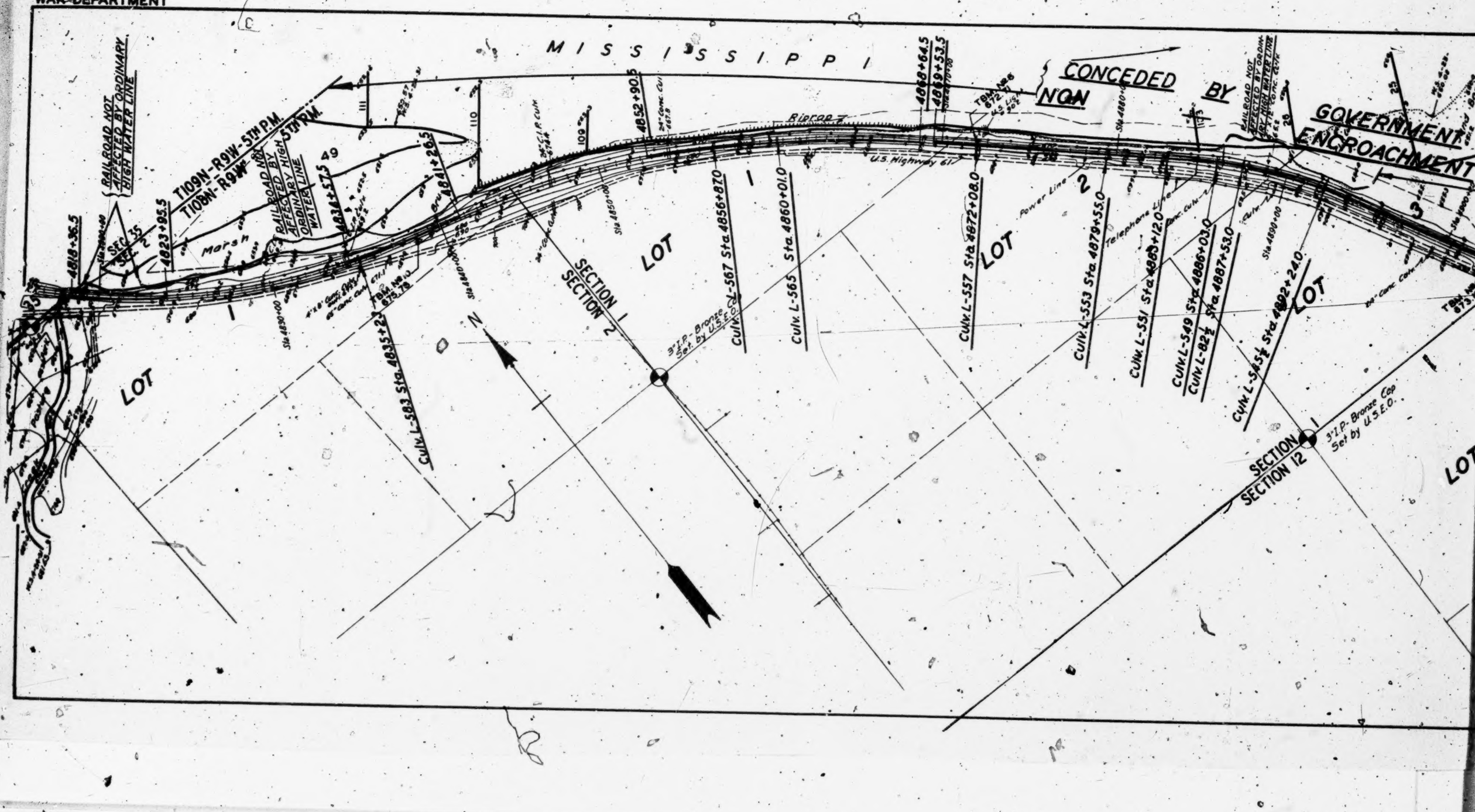
WAR DEPARTMENT



GOVERNMENT ENCROACHMENT TO BE

AREA

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No III

CONCEDED BY GOVERNMENT TO BE NON-ENCROACHMENT AREA

CLAIMED BY GOVERNMENT TO BE ENCROACHMENT AREA No II

CONCEDED BY GOVERNMENT TO BE NON-ENCROACHMENT AREA

RAIL ROAD

ORDINARY HIGH WATER MARK AFFECTED BY LINE

ORDINARY

RIVER

LOT

LOT

LOT

LOT

LOT

LOT

SECTION 12

SECTION 7

SECTION 18

T 108 N R 9 W 5th P.M.

Bridge L-82 - Sta. 4920+68.0

Bridge L-80, Sta. 4957+28

U.S. Highway

Telephone Line

Power Line

Slough

Sand Bar

Willows

Mud Flat

Timber

Brush & Timber

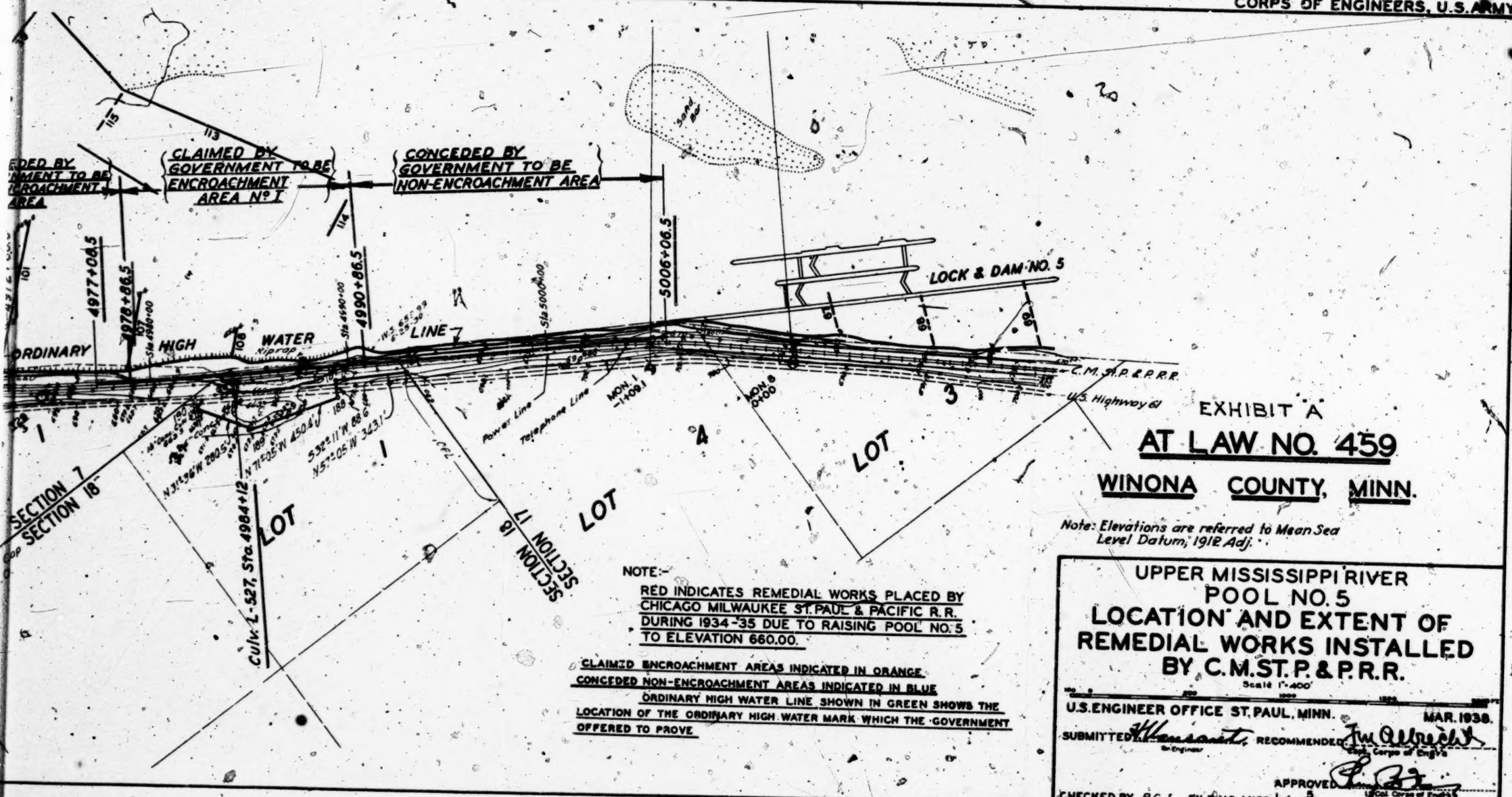
Creek

3" I.P. - Bronze Cap Set by U.S.E.O.

2" C.I. Pipe

WINONA CO., MINN.

CORPS OF ENGINEERS, U.S. ARMY




NOTE:-

RED INDICATES REMEDIAL WORKS PLACED BY CHICAGO MILWAUKEE ST. PAUL & PACIFIC R.R. DURING 1934-'35 DUE TO RAISING POOL NO. 5 TO ELEVATION 660.00.

CLAIMED ENCROACHMENT AREAS INDICATED IN ORANGE.
CONCEDED NON-ENCROACHMENT AREAS INDICATED IN BLUE
ORDINARY HIGH WATER LINE SHOWN IN GREEN SHOWS THE LOCATION OF THE ORDINARY HIGH WATER MARK WHICH THE GOVERNMENT OFFERED TO PROVE

EXHIBIT A

# AT LAW NO. 459

## WINONA COUNTY, MINN.

Note: Elevations are referred to Mean Sea Level Datum, 1912 Adj.

UPPER MISSISSIPPI RIVER
POOL NO. 5
LOCATION AND EXTENT OF REMEDIAL WORKS INSTALLED BY C.M.ST.P.&P.R.R.

Scale 1"=400'

U.S. ENGINEER OFFICE ST. PAUL, MINN. MAR. 1938.

SUBMITTED: _____ RECOMMENDED: _____
Dist. Engineer — Div. Engr. Corps of Engrs

APPROVED: _____
Lt. Col. Corps of Engrs

CHECKED BY R.G.J. FILE NO. MISS. L/D 180

AS REVISED MAY 6, 1938

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Stipulation of June 16, 1938, United States Circuit Court of Appeals, Eighth Circuit.

Still in appeal—Wabasha County, Nos. 460 and 461.

1. Land lying easterly of Station 4795 in Government Lot 4 and westerly of Station 4807 in Government Lot 5, all in Township 109 North, Range 9 West of the 5th P. M. Wabasha County, Minnesota.

It is further stipulated and agreed that as to the above described area, the portion of the judgment applicable thereto is as follows:

| | | |
|---|---|---|
| Riprap 3594.5 cu. yds. at | $1.66209 | $5,974.38 |
| Small Culverts | | 800.00 |
| Tel. and Tel. | | 472.83 |
| Total | | $7,247.21 |

Whereas, it is agreed between the parties that the sum of money representing the various expenditures and claims in area referred to in Part One hereof, represents the fair and reasonable cost of adjusting the structure and right of way of said Railroad Company within the area so delineated and described, and each item thereof; and that the railroad embankment in said area so delineated and described is situated between the low water mark and ordinary high water mark of the Mississippi River.

It is stipulated and agreed that hereafter, either on appeal or in a new trial as to the area referred to in Part One hereof, the sum set forth in this stipulation shall be deemed to be the fair and reasonable cost of the various items therein referred to and no part thereof shall hereafter [fol.135] be controverted between the parties, and

It is further stipulated that at the time of the construction of the Railroad in 1910, as well as at the time of the commencement of the instant condemnation proceedings, the railroad embankment in said area so delineated and described was placed upon land which was between the low water and ordinary high water mark of the Mississippi River, no part of which facts, either on appeal or in a new trial, as to the area referred to in Part One hereof, shall be hereafter controverted between the parties.

It is stipulated and agreed that if the Court shall give effect to this stipulation, the appellant waives all assignments of Error except assignments Nos. XII and XIII and that portion of the assignments of Error which charges error in the entry of judgment thereon.

This stipulation was approved by the Court in September 1938. The original stipulation in full with map marked "Exhibit A", 'At Law Nos. 460 and 461', is on file in the Circuit Court of Appeals and a copy of said map on a reduced scale is reproduced herein.

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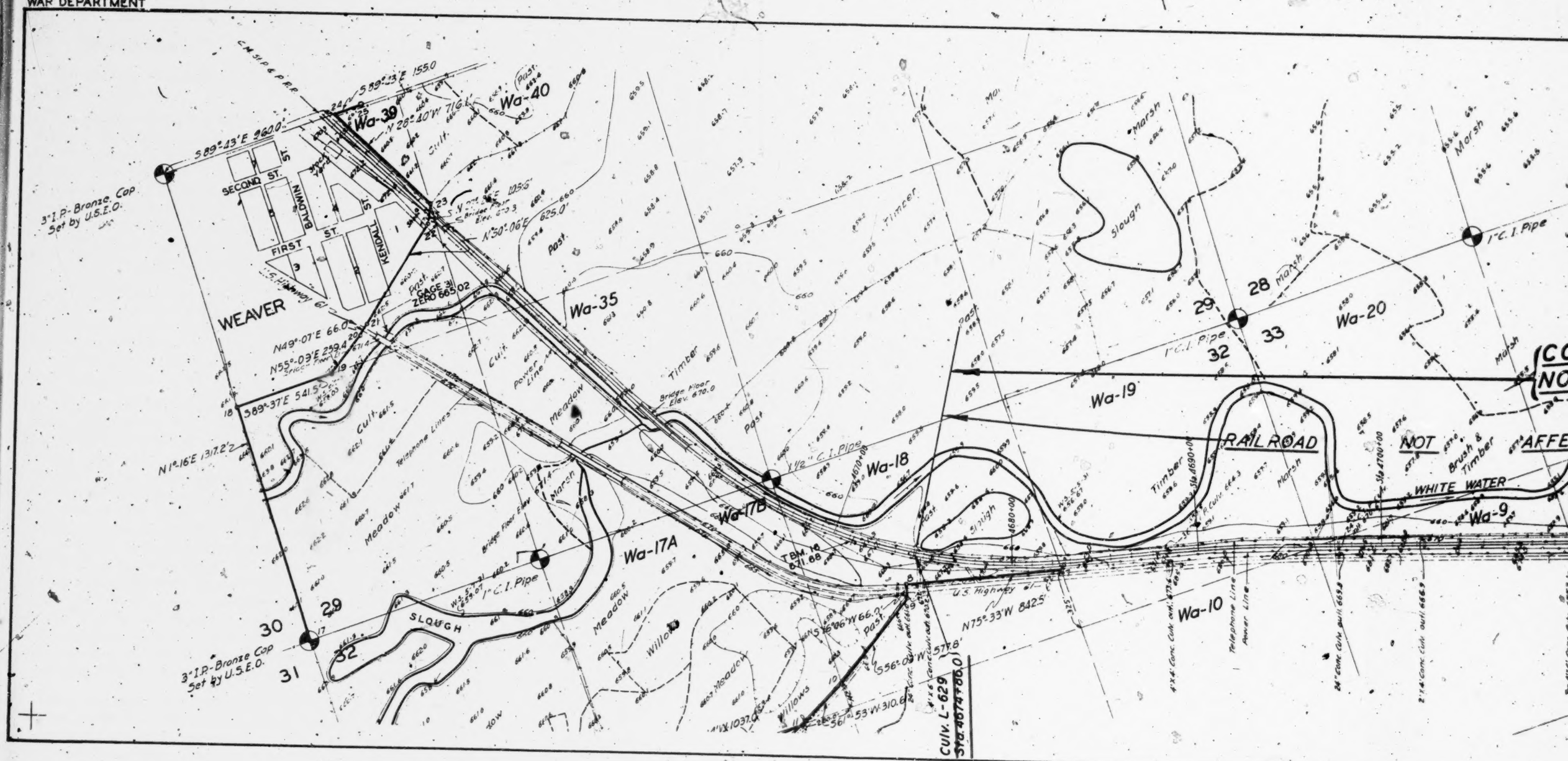
WAR DEPARTMENT



CONCEDED NON AFFECTED BY GOVERNMENT ENCROACHMENT

AREA TO BE

INDIAN CREEK

WHITE WATER RIVER

Wa-4B

Wa-4A

Wa-4C to Wa-4K INC.

Wa-8

ORDINARY HIGH WATER LINE

Marsh & Brush

Brush & Scattered Woods

Cordwood (Maple)

Timber

Pasture

Cemetery

Conc. Culv.

T.B.M. 12
671.87

T.B.M. 14
665.41

Sta 4710+00

Sta 4720+00

Sta 4730+00

Sta 4740+00

Sta 4750+00

Sta 4760+00

Sta 4770+00

Sta 4780+00

Culv. L-613 Sta. 4740+41.0

4744+32.5

4753+99.5

4736+89.7

LOT 3

LOT 4

SECTION 33

SECTION 34

GREENWOOD

MARIA

LOUISA ST.

CYNTHIA ST.

WILLIS ST.

ROSE ST.

CENTRE ST.

ALLANSEN ST

WELLINGTON

FIRST ST.

SECOND ST.

THIRD ST.

WALL ST.

24 AVE.

MINNEISKA

Culv. L-611 Sta. 4756+43.0

Culv. L-607 Sta. 4775+59.0

Culv. L-605 Sta. 4781+19.0

Culv. L-603 Sta. 4787+41.0

Culv. L-603 Sta. 4791+03.0

Culv. L-601 Sta. 4793+77.0

Culv. L-599 Sta. 4796+09.0

Culv. L-595 Sta. 4799+48.0

GAGE 32
ZERO = 650.0
105

3" I.P. Bronze Cap
Set by U.S.E.D.

T 10
T 10

WABASHA CO., MINN.

CORPS OF ENGINEERS, U.S. ARMY

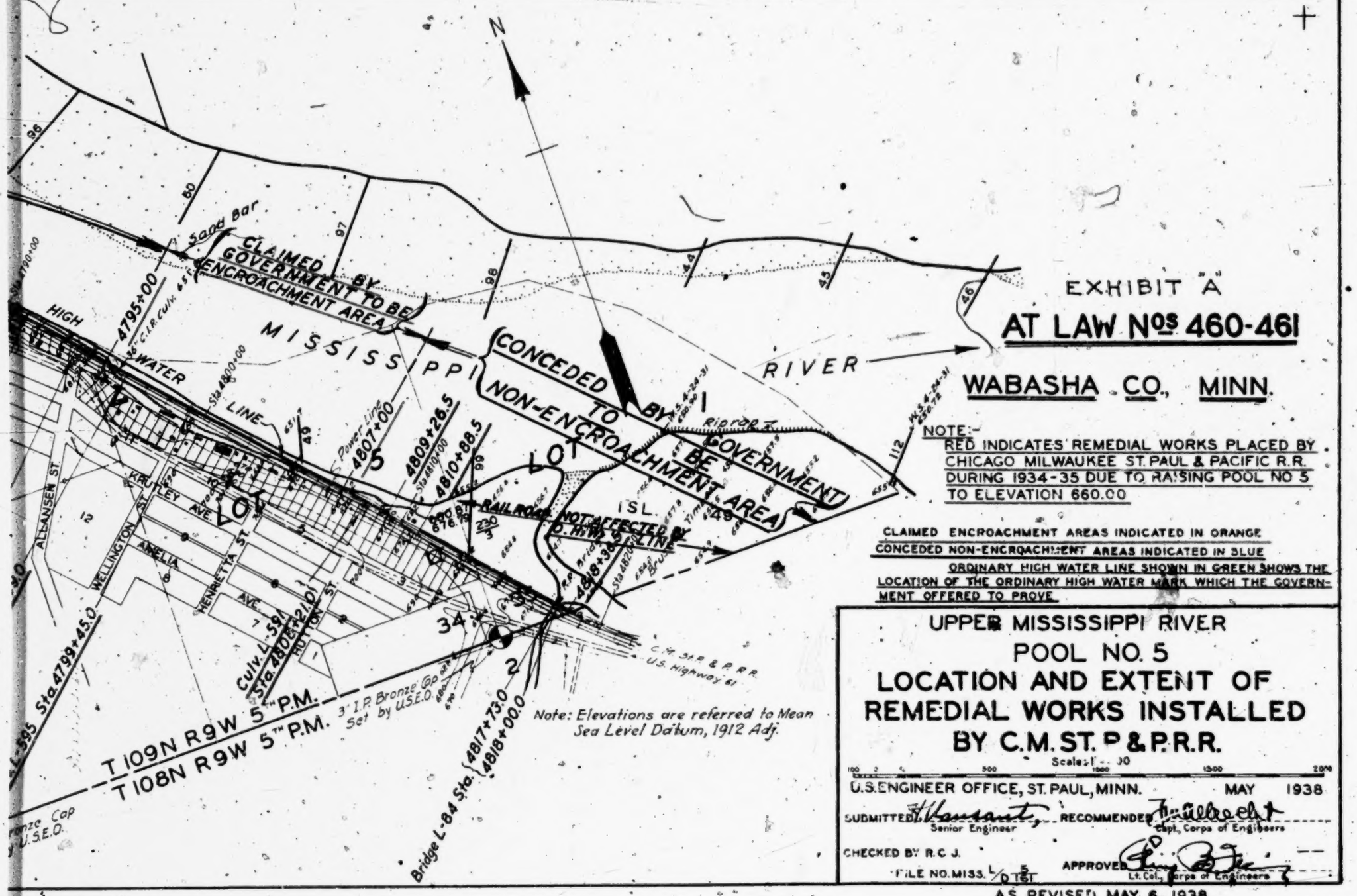



EXHIBIT "A"

# AT LAW Nos 460-461

## WABASHA CO., MINN.

NOTE:-
RED INDICATES REMEDIAL WORKS PLACED BY CHICAGO MILWAUKEE ST. PAUL & PACIFIC R.R. DURING 1934-35 DUE TO RAISING POOL NO 5 TO ELEVATION 660.00

CLAIMED ENCROACHMENT AREAS INDICATED IN ORANGE
CONCEDED NON-ENCROACHMENT AREAS INDICATED IN BLUE
ORDINARY HIGH WATER LINE SHOWN IN GREEN SHOWS THE LOCATION OF THE ORDINARY HIGH WATER MARK WHICH THE GOVERNMENT OFFERED TO PROVE

UPPER MISSISSIPPI RIVER
POOL NO. 5
# LOCATION AND EXTENT OF REMEDIAL WORKS INSTALLED BY C.M. ST. P & P.R.R.

Scale: 1" = 500'

U.S. ENGINEER OFFICE, ST. PAUL, MINN. MAY 1938

SUBMITTED: [signature], Senior Engineer — RECOMMENDED: [signature], Capt, Corps of Engineers

CHECKED BY R.C.J.

APPROVED: [signature], Lt. Col., Corps of Engineers

FILE NO. MISS. L/D 5 TST

AS REVISED MAY 6, 1938

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Opening Statement of Counsel for Condemnor

The opening statement of Counsel for the condemnor was in part as follows:

The people of the United States have, as his Honor will declare, the right to raise waters artificially in any navigable channel to what is known as the ordinary high water mark. The evidence will disclose to you what elevation the Government from its investigation considers to be the ordinary high water mark, and because that mark is the limit to which the Government may raise its waters without the payment of any compensation to any person. Beyond that, of course, the Government has a liability.

Now, then, the next evidence that will be put before you is with respect to what the Government calls encroachments; that means encroachments upon the channel of a navigable stream in the United States, the building of structures; the building of embankments below the ordinary high water mark.

It is the position of the Government, and His Honor, The Court, will declare the Law to you, I think, that within the [fol. 136] limits of any encroachments, that is, with respect to any encroachments or any portion of the embankment which is on the public property of the United States, there can be and that there is no liability. Now, the question before you will be, to decide on the facts as to what do or do not constitute encroachments. We shall bring you the evidence of the United States Engineers as to what the original ground line was along this railroad, and, bear in mind, ladies and gentlemen, that it was constructed in 1910. There will be four encroachments claimed by the Government. The first of them will be in the vicinity of Station,—well, roughly, in the vicinity of Culvert L-527, which has been spoken of here in the evidence, or between Stations 4990 plus 86.5 to and including Station 4978 plus 86.5.

Now, you may have remembered that in the examination of one of the witnesses the question was asked with reference to the original ground line on Railroad Exhibit 2, and you may remember that the Government called out the depth of water that would exist below the water mark which is shown on this exhibit. That was for the purpose of

showing you that the structure as it is reproduced in these profiles was within an encroachment area, or on public property of the United States.

The depth of the water indicates,—now, I may say to you that the elevation of the ordinary high water mark, as it will be developed by the Government, is substantially a foot higher than that that has here been reproduced by the Railroad Company in this exhibit. (Railroad Exhibit 2.) You will also bear in mind that the Railroad Company has not as yet submitted proof to you with respect to the high water mark, and we will show you what the elevation of this ground under this fill was.

The next encroachment which the Government will have to do with, and which we will discuss in the evidence is in the vicinity of Culvert L-80, as you will observe it on the map. I shall show you, and I believe the evidence will sustain a finding that there was once, and before it was closed in by the new embankment in 1910, a part of the Mississippi River, that there was deep water there, and those stations, [fol. 137] or the limits of that encroachment are given as between 4968 plus 86.5 to Station 4948 plus 68.5, for a distance of 2,000 feet.

The next encroachment which the Government claims is slightly westerly of L-80, and is a distance of some 900 feet. For convenience, it will be referred to as farther up the bay from Station L-80, that is farther westerly in the bay; that is, between Stations 4936 and 4927, or a distance of 900 feet.

The next encroachment which the Government will claim, and which we believe the evidence will sustain, is some 1200 feet between Station 4807 to Station 4795. Now, that encroachment, in general, is located right at the town, or on a portion of the ground on which the present railway depot at Minneiska is now located. Now, the Government will endeavor to show you, first of all, from the original records where the original ground line was in each of these encroachments. We shall take The Railroad Company's own profile and show you where the natural ground line was. We shall show you that the water, or that there would have been water at the original high water mark at

each of these stations; that the Railroad Company actually built within the limits of the stream at those places.

In addition to that,—and that will be the engineering method of developing the proof,—we shall show you that that refers to the original source of the material, the Railroad Company's profiles or other records that are commonly resorted to, and if that be not enough, then we shall show you, by the evidence of residents in this community, and when I say "this community", I speak of Minneiska, —that at the time of the reconstruction of the railroad, that the railroad as it now exists at these four points was actually built in the water.

Now, I may say to you this, that the evidence will also disclose that the stationing to which I have made reference here is the outer limits of the bank, these bays or curvatures, as indicated by my hand here, that is, as far as the outer portion of these limits are concerned, or where the protective measures are concerned.

[fol. 138] Now, then, in addition to proving that to you, we feel satisfied that one method might be enough, but to prove it from the original source of the material, we will endeavor to show you by the testimony of witnesses who live in that community.

In addition to that, we shall show you that the Railroad Company itself by letters of one of its division engineers indicated the precise places to which we now make reference, as being places in which it proposed to cross the bayous and sloughs of the Mississippi River.

Now, then, as I say, with respect to these four areas, it is the position of the Government, and will be the position of the Government, that they are under no liability.

May I say to you right here, that it is not the desire of the Government to take undue advantage of the Railroad in any of these places and it is also the belief of the Government that where the use of a public domain is given that certainly when the United States seeks to use it for its own public purposes, that we ought to be, and we believe that it is under the law free of any liability.

At the close of the condemnor's opening statement, counsel for the condemnee made the following objection:

(Not in the hearing of the jury)

Mr. Erdall: If Your Honor please, we object to the materiality of any testimony on the question as to where the ordinary high water may or may not exist, for the reason that that is not material in this case; that the Secretary of War has not declared that any area in which the Railroad Company is located, in any way obstructs navigation, and Congress has not so held: On the ground that no decision of the United States Supreme Court has ever permitted the United States Government to raise water levels in any river [artificailly] without compensating the owner for any property which it may own, which is taken or partially taken by such raised waters;

[fol. 139] On the ground, that the United States Supreme Court has on several occasions specifically permitted recovery where land was located between the ordinary high water mark and the low water mark, where the rivers were [artifically] raised by Government projects; and on the ground that there is no federal decision,—

The Court: (Interrupting) Just a minute. You are asking me now to rule on that, and you are asking me now to make a ruling. If you wish to argue that matter, I had better let the jury go and let you argue it. You can do so at this time, or you can do so when the evidence is offered.

Mr. Erdall: Well, Mr. Courtney has indicated that they are going to introduce proof along the line of the ordinary high water mark, and I feel that possibly it might be desirable for us at this time to have that matter decided one way or the other.

The Court: It probably would, and I had better let the jury go and have you discuss it. Do you want to discuss it now?

(Argument by counsel for condemnor and condemnee during the course of which the following was stated.)

Mr. Erdall: If the Court please, in view of the opening statement which has been made by counsel indicating that it is the intention of Government to introduce proof to

show what the ordinary high water mark is, and will contend in this case that they are responsible only for lands and for property of the Railroad which were originally constructed upon lands which were located above the ordinary high water mark, and in view of the fact the Government takes the position as indicated in counsel's opening statement, that they are permitted to artificially raise the levels of the water of the Mississippi River and its tributaries, up to the ordinary high water mark, even though in a state of nature at many seasons of the year it would be considerably below the stage of ordinary high water mark, it is our view that the Court possibly, for the con- [fol. 140] venience of the trial of the case, should know whether or not that question should be included in this case.

The Court: Of course, they have a right to use the water to high water mark, if the river is that high, but have they got the right to artificially raise it to that height, and maintain it at that height? That is the question here.

Mr. Harrington: Well, I will answer that in this way, Your Honor, on a matter of just plain logic: If the right of the United States extends to ordinary high water for the purpose of navigation, how can they assert that right without placing a dam in the stream?

Now, if you say that the United States cannot interfere with the natural flow of the stream, then the principle that it has the right up to the ordinary high means nothing, because they cannot raise the water to ordinary high,—the Almighty God takes care of the natural flow of the stream.

The Court: Well, Almighty God sometimes raises it to the high water mark, and sometimes higher, and in those instances, the Government, of course, has the right to use it for navigation purposes, but have they the right themselves to put it that high without paying for the property that is destroyed by reason of it?

The Court: Well, gentlemen, I did ask a question of whether or not, as a matter of fact, the evidence will show that raising the water up to ordinary high water mark would have done this damage?

Mr. Erdall: I will answer that question.

The Court: If the raising of this water up to ordinary high water mark did none of the damage, but the raising of it above that did the damage, then all your discussion is of no importance.

Mr. Erdall: The only point of importance that comes in, is that, as I understand their position,—I will answer the first question that we will not be damaged by the raising of the water up to the ordinary high water mark,—I think your Honor is right in the position you have taken, but [fol. 141] their contention is that a part of our embankment area was originally built upon land which was below the ordinary high water mark, but we will not be damaged by reason of their raising the water to the high water mark, but we will be damaged by reason of their raising it above the high water mark.

The Court: If the evidence shows that, then this discussion is probably immaterial.

Mr. Erdall: Mr. Middleton just gave me a note here, and I believe he testified before the Commissioners, but he said he testified to it here, that there would be no damage if the water was raised to the ordinary high water mark. I know that will be our testimony, because that is the view of our witnesses. It is conceded by counsel for both parties that no damage would occur by raising the water to ordinary high water mark.

Mr. Harrington: Well, I don't think there will be any doubt about this, that in the encroachment areas—this may not be generally true, but it is substantially true,— that the 660 pool will raise the water six or eight feet over what we claim the ordinary high water to be.

The Court: Well, if that is true, and if it follows that raising the water up to high water mark did no damage at all, and it was done by raising it above high water mark, then this discussion is of no value except as to one point; that is, that you say that if they built, if the railroad built its road upon swampy land that was below high water mark, that they hadn't any right to land that was below high water mark, that they hadn't any right to build there, as I understand it, and that you could order them to take it off. Well, I can hardly, so far, agree with that, and my idea is that they owned to low water mark, and if

they built their railroad on land which was above low water mark, they had a right to build it there, subject to the right of the United States to flow the land up to high water mark, if that is the rule, and if they have raised the bed above high water mark, that the raising of the river up to high water mark, if it did no damage, I cannot see where the United States loses anything. That is, I would instruct, unless I am convinced differently, that the owner, the ripar- [fol. 142] ian owner, in this case the Railroad Company,—I suppose it owns the land in the river—that the riparian owner had a right to build and occupy and put structures, and to put its railroad upon land down to low water mark, subject to the right of the United States, of course, to raise the water, if your rule is right, to high water mark, and if the raising of it to high water mark did no damage, but if raising it above high water did do damage, that then the Railroad would be entitled to recover for the damages caused by raising it above high water mark on this land.

Mr. Harrington: Now we are down, I think to the gist of the whole argument. I would like to state, if there is no objection, our theory.

The Court: Of course, you understand, I have not ruled on the question of high and low, and it may be of no importance to rule on it.

Mr. Harrington: Not if the latter instruction should ultimately be your conclusion. I think that the theory of law is determinable now, and I do not see, frankly, any reason for proceeding with the trial of this cause on the basis of ordinary high water, or anything else associated with it, if your instruction ultimately will be that the Railroad Company is entitled to damages by reason of the raising of the water over ordinary high at points where the embankment itself is located below ordinary high. In other words, as previously stated, the testimony will show here that the water will be raised six or eight feet over the ordinary high level that we claim.

The Court: And that would do the damage?

Mr. Harrington: Well, it certainly will do more damage, at any rate, than the amount of flowage that would be below our claimed ordinary high; so we are down to the point now where we can determine the legal theory, but I

know it either will qualify and make material the evidence we propose to offer, or else our evidence will be ultimately immaterial to the final disposition of the case.

[fol. 143] The Court: Well, it is my impression now that this railroad had a right to build; that it owned as riparian owner to the low water mark, and that it had a right to build there, and the United States had the right to regulate the water, and to put in a dam there for the purpose, and that the railroad—if you say that the railroad is not damaged by raising it to high water mark, then I would say that the railroad could recover for damage done to the railroad where they have built upon swampy land which was above low water mark. They had a right to build there, and the Railroad Company would have a right to recover damages for raising the water above high water mark, all that was done by raising it above high water mark. That would be my idea.

Mr. Harrington: Well, may I state our position?

The Court: Yes.

Mr. Harrington: Our position is this, in substance, that the element of riparian ownership relating to the extension of title to the low water mark is, for the purpose of the issue under discussion, a purely technical title. The title, whatever it may be, is subordinate to the servitude possessed by the United States to raise the water in the Mississippi River to ordinary high. We claim that the testimony will show that four sections of the railroad embankment, of varying lengths, are built riverward from the ordinary high water mark; that such being the case, when the United States, in the improvement of navigation, raised the water in the river to or above ordinary high, any structure or embankment which is located in the bed of the river below ordinary high must suffer the consequences of the raising of the water to ordinary high, as well as above ordinary high. This conclusion must follow from the premise that under the Fifth Amendment the United States is liable only for the taking of private property. No riparian owner, whose property is located below ordinary high water, can assert a right against the United States for any compensation for the reason that he at some time possesses a private property right, in view of the permanent servitude pos-

[fol. 144] sessed by the Federal Government. Now let me demonstrate that practically if I may. Coming over here to the map; let us assume for the purpose of argument that this line is the established line of ordinary high. The Railroad embankment puts its track in the river so. Now this embankment, let us say, is built up ten feet above the surface of the water, the water level would be at ordinary high, and that there is two feet of the embankment which projects below the surface of the water. Now it is perfectly obvious that if there is a servitude extending over all of this area, so that the rights of the riparian owner are expressly subjected to having this area flooded up to ordinary high at any time the United States may proceed to so flood it for the purpose of improving navigation, this man built his embankment on the property below ordinary high, charged with knowledge that the United States may at any time commandeer that area, which it has the right to do.

The Court: Up to high water mark?

Mr. Harrington: Up to high water mark. Therefore, he places his embankment charged with that knowledge as a matter of law, and the United States is not only entitled to raise this water to ordinary high, but it has the right to exclude him entirely.

The Court: The right above ordinary high?

Mr. Harrington: No, it has the right to exclude him. For instance, the United States would have the right to say to the Milwaukee Railroad, "If your Railroad lies below ordinary high, move it out, because we will not pay you compensation. Your embankment is an obstruction. It is an obstruction because of the fact that its presence burdens navigation with monetary loss or compensation." Now I want to point out one thing more. That position must be true because if you base your ruling on the law in Minnesota that a riparian owner has a right to place an embankment in the river down to low water mark, let us go across the river and see what the situation would be in [fol. 145] Wisconsin. In Wisconsin the state law says that a riparian owner owns to the thread of the stream, and so, by the same token somebody over here at Buffalo City can build his embankment out in here, and on the prineiple that I understand your Honor to state, he would be just as

much entitled to compensation as the Milwaukee Railroad would be down in here. If that proposition is right, it seems to me the other proposition is right. There has got to be some arbitrary line to divide the public from the private right, and that line we contend is the ordinary high, not vertically, but horizontally, that is looking at it on the plane. That limits the liability of the United States and likewise limits the rights of the riparian owner.

Mr. Erdall: I might say, with reference to that situation, that Congress has not said that they need to have this obstruction removed. If there is any obstruction in the river itself, and they need it for their boats to travel on, then it would be like a bridge. They might be permitted to have it removed; but they do not contend that. They say, "No, we don't want to pay for it. You have a property right under the state law. We don't need it for navigation. We are not going to put navigation in there, but we just don't want to pay you for it." That is all their argument amounts to. The same thing over here. If the state of Wisconsin over here at Buffalo City, had built over here to the main channel of the river, and had occupied it for years as we have, and under the law of Wisconsin they were entitled to do that, there might be a right in the Government to remove it if they wanted it for boats to go in there, but if it is merely a question of saying, "We will not pay for it" I don't think there is anything to their argument. There might be a situation where they can raise the water up to ordinary high water mark. We deny that. Your Honor says you might—

The Court: Well, I have indicated that it was hardly necessary for me to rule upon it in view of the fact that there is no damage done by the raising of the water up to ordinary high.

[fol. 146] Mr. Erdall: We are not going to be damaged by reason of raising the water up to ordinary high water mark. All of our damage is going to be above that mark, because of our embankment being continually saturated by the waters at the high level.

The Court: The Railroad, if your theory is right, the high water mark theory, the Railroad cannot claim damages for raising, the water up to high water mark. The

Railroad does own the fee simple title in the land, subject of course to the right of the Government to flow it to high water mark. If the structure does not interfere with the flowing of it to high water mark, does not interfere with the channel for navigation, it seems to me they have a right to damages for flooding above high water mark.

Mr. Harrington: But it becomes an obstruction to navigation because, in order for the United States to exercise its right, for instance, in this case—

The Court: How does it become an obstruction of navigation above high water mark?

Mr. Harrington: It becomes a financial obstruction, and the financial obstruction is based on what is in the bed of the river.

The Court: Well, I will not definitely rule on it until afternoon.

Mr. Courtney: There is just one other very short statement I would like to make. I take it your position is that the damages may ensue above ordinary high water mark?

The Court: Yes.

Mr. Courtney: That we might raise to ordinary high. The position of the Government is this, that the structure is unlawful, not what is below the ordinary high water mark, but the structure—it cannot exist—this railroad structure cannot exist without the embankment being below ordinary high water. Now let us see whether this indivisible structure is lawful. The act of 1899 says, "No man can build any structure—".

The Court: No, it does not say that. It qualified it.

[fol. 147] Mr. Courtney: "It shall not be lawful to flow or in any manner—" what is this but a flowage— "or in any manner to modify the course, location, condition or position of any navigable channel."

The Court: Well, does this do that?

Mr. Courtney: Yes, your Honor.

The Court: How does it?

Mr. Courtney: Certainly it is unlawful.

The Court: Well, I can't see that. It has been the rule in all of the cases that the riparian owner can build down to low water mark, subject of course to the right of the Government to raise the waters, if your rule is right, to high water mark, and this would not interfere with the raising of it to high water mark. It only interferes with their raising it above high water mark.

Mr. Erdall: One word about Barr vs. Spaulding. That was an equity proceeding. If they had any damages in that case, they had their right to bring it under the Tucker Act. We do not contend that the Government cannot go ahead and raise the water up as high as they want to. Our contention is that when they get above the natural levels, they have got to pay for it. In this Court we are asking for damages. In that case they were trying to enjoin Spaulding, who was the officer in charge of the improvement of the river, from going ahead with the work, and the Court said that if he had any remedy, he had a remedy at law.

The Court: Well, do you wish me to make a formal ruling here now?

Mr. Courtney: Well, I have no preference in the matter; we are perfectly willing.

The Court: Well, I will say that, as I understand the position of the Railroad and Western Union Telegraph Company, that they concede that there was no damage done by raising the river to the ordinary high water mark; they claim that the damage is all done by reason of raising [fol. 148] the water above the ordinary high water mark, and therefore, that being the case, it is hardly necessary for the Court to rule on the proposition as to whether or not the Railroad is entitled to recover any damages done by the raising of the water up to the high water mark.

But, as I understand the Government's position, they claim that part of this land occupied by the Railroad Company now, and when the road was re-located, that it was located upon land of which the Railroad Company was the riparian owner, but which was land that was above the low water mark, and below the high water mark.

Mr. Courtney: No, if Your Honor please, the low water mark has not yet been established; it has not thus far been in the case.

The Court: Well, you at least contend that it was built below the ordinary high water mark?

Mr. Courtney: Below the ordinary high water mark.

The Court: And that the Railroad is not claiming any damages by raising the water up to the high water mark, but is only claiming damages by raising the water above the high water mark,—then I would say, with reference to that aspect of the case, that I will hold that the Railroad, as the riparian owner, had the right to construct its road on the lands in question, and that it has the right of recovery in this case, as it contends that there was no damage done by reason of raising the water up to the high water level, and it is only claiming damages by raising the water above the high water level; that the Railroad is entitled to recover for damages done by the raising of the water above the high water level.

Mr. Courtney: To this ruling, the Government excepts.

The Court: Yes, an exception is allowed.

Mr. Courtney: Now, if the Court please, we would also, for the purpose of the record, like to make an offer of proof.

The Court: Yes.

[fol. 149] Mr. Courtney: I presume it should be made in written form, which would probably be the most satisfactory.

The Court: You probably can do it in better shape that way; you can do it that way if you wish.

Mr. Courtney: It will require a reference to the exhibits, and we desire to make the record clear upon that.

The Court: Very well.

Mr. Courtney: I assume that for the purposes of the record, we had better call the witnesses and have them sworn, and let the objection be noted, to the ruling made.

The Court: Very well.

MAGNUS P. EKBERG.

Direct Examination.

By Mr. Courtney:

I am employed in the United States Engineer's office at St. Paul and have been so employed since the spring of 1928. Much of my time has been spent in studies in connection with the improvement of the Mississippi River for the so-called nine-foot channel, as well as other streams in the St. Paul District which includes the Mississippi River above Prairie du Chien and its tributaries. I have had occasion to observe the ordinary high water marks in the area of the river between Lock and Dam No. 5 and Alma, Wisconsin. I made a special study of such marks including those in the Pool 5 area. In this river there is a variation betwen the extreme high stage and the extreme low stage of about twenty feet, and, in rising and falling, it has an [affect] upon the banks of the stream, upon the vegetation in the valley and on the islands. There are characteristic marks which indicate where the presence and action of the water has been such as to leave a definite mark. Government's Exhibit 9 is simply a photostatic copy of Railroad Exhibit 2. I have reproduced the elevation that I determined to be the ordinary high water mark in green color on that exhibit. That line is not extended throughout the entire profile.

[fol. 150] The ordinary high water as reproduced on Government Exhibit 9 at Lock and Dam No. 5 is 652.4; at L-527 it is 652.5; at L-80 it is 652.9; directly below L-82 it is 653.1 and at the Minneiska depot it is 654.4. This ordinary high water is based upon my studies and determination in the field. The elevations of ordinary high water I have just given are reproduced on Exhibit 9 except the ordinary high water at the Dam.

The farther upstream you go, necessarily the higher the elevation of the water mark.

Cross-Examination.

Mr. Erdall: Well, I think, after looking over this exhibit here—as I understand, Government's Exhibit 9, the Court has excluded all information on here except the information showing where Mr. Ekberg claims the ordinary high

water mark is, and except insofar as that ordinary high water mark shows the location of the points where the riprap is to be placed, and the places where the culverts and bridges are located—if it is admitted only for that purpose, we will not object to it at this time. As I understand also, Mr. Harrington has stated that there is no difference of opinion between the Government and ourselves so far as our damage is concerned if it were located between a point one foot below substantially where our ordinary high water mark would be, if our proof were introduced, and the point where Mr. Ekberg, has shown it here. In view of the fact that he says that, and unless the Court permits them to go into some sort of an inquiry like that, we will have no objection to the exhibit under the ruling of the Court.

Mr. Courtney: Well, I want to make this clear; this exhibit is a photostatic copy of Railroad Exhibit 2. The only addition is the elevation of the high water mark, which is reproduced in green and is readily distinguishable. It is an exact photostatic copy of the railroad's own evidence, and I offer it not only for the purpose of showing the high water mark line as testified to by the witness, but for all purposes.

[fol. 151] The Court: That is, you also want to offer it to show what the Railroad Company's evidence already shows?

Mr. Courtney: That is right.

The Court: Well, why do you want to show it over again?

Mr. Courtney: For such use as would be convenient, for ready reference. Everything is on one sheet.

Mr. Erdall: We might just as well come out in the open. What they are contending for and the only thing they are contending for is the question of the ground line.

The Court: I will admit it so far as it shows the elevation line, that is, insofar as it shows the high water mark, everything relating to that, and for that only.

Mr. Courtney: We will except to the portion of the ruling which excludes the ground line. That is all.

Mr. Erdall: That is all.

The Court: That said four segments as constructed, were built below high water mark and above low water mark and did not interfere with the navigable portion of the stream.

Mr. Erdall: As I understand, the thing that we are contending for, respectively, is that the Government contends that a portion of the Railroad's embankments and structures in 1910 were built upon portions of the Mississippi River, which were located between low water mark and ordinary high water mark.

The Court: Yes.

Mr. Erdall: And the Railroad Company contends that they were entitled to do that, and that if that portion of its railroad is not actually needed for the navigable portion of the stream, that the Railroad Company is entitled to recover if the water is raised above ordinary high water mark against those embankments. The Government contends that if those embankments were located between low water mark and ordinary high water mark, that the Railroad Company cannot recover for those embankments no matter to what level the water is raised.

[fol. 152] The Court: As I understand, the claim of the Railroad is that those portions in two or three different sections, or at two or three different points along this area —that the Railroad was built upon the railroad's land below high water mark and above low water mark, and my instructions concerning that would be that the land owner, that is, the riparian owner, the railroad, had a right to build upon that portion and that they had a right to build to low water mark any structure, subject to the paramount right of the United States to use the river for navigation and for the improvement of navigation; and that that being so, and it being conceded that the Railroad was not damaged by raising the water to high water mark, but is liable to the Railroad for damages done to the Railroad at those points, by raising it above high water mark.

Mr. Erdall: And I presume that you mean ordinary high water mark?

The Court: Ordinary high water mark, yes.

Mr. Middleton: Then if perhaps at a later time, it becomes necessary to retry this case, we will not be estopped from introducing our own high water marks.

Mr. Harrington: No.

The Court: That said four segments, by reason of being constructed below high water mark and above low water mark constituted encroachment?

Mr. Harrington: Yes.

The Court: Is that your offer?

Mr. Harrington: That is the intention of it, the intention of our offer.

Mr. Harrington: That said four segments so constructed, constituted encroachments upon the channel of a navigable stream for the reason that said segments were constructed above low water mark and below ordinary high water mark.

The Court: That said four segments so constructed, constitute encroachments on the channel of a navigable [fol. 153] stream for the reason that said segments were constructed above low water mark and below ordinary high water mark.

The Court: Well, you can draw a stipulation and sign it, and put it in the record.

Mr. Erdall: It is further stipulated that the fact that the Railroad does not in this case offer any proof to show that the claimed encroachment areas are not located upon navigable waterways of the United States, shall not foreclose them from introducing such proof in any trial of this case.

Now, you have no objection to that, have you?

Mr. Harrington: No objection to that.

Mr. Erdall: So as not to have any misunderstanding, as I understand it, you are stating, for the purpose of this trial, that the railroad embankments were located between the ordinary high water mark and the low water mark at

the places where you claim encroachments, and you are making no claims of anything that is located below the low water mark, so far as this particular trial is concerned.

Mr. Courtney: That is correct.

Mr. Erdall: And so far as the offer of Exhibit 9 is concerned, you do not make any claim as to anything below the low water mark, for the sake of this trial?

Mr. Courtney: That is right.

The Court: Well, I think that should be in the record, because it might be misconstrued.

Mr. Courtney: And in addition to that, we both reserve the right,—no prejudice arising to either party from this position—to raise the question of the location of the low water mark at any of these points, on any other trial.

The Court: Or on this trial if it is sent back for re-trial.

Mr. Courtney: Yes, or on this trial.

The Court: Now, he has offered that exhibit; do you have any objection to that exhibit which he is offering now, subject to that, that it does not show below the low water mark.

[fol. 154] Mr. Erdall: I have not any objection to it in this trial.

The Court: Well, then, I will admit it.

(Government Exhibit 9 received in evidence.) (The original Government Exhibit 9 has been transmitted to the Circuit Court of Appeals by order of the District Court.)

Mr. Harrington: The Government offers to prove that four segments of the Milwaukee Railroad are constructed below the ordinary high water mark as previously testified to by the witness Ekberg; and we concede, without prejudice to future litigation, that each of such segments were built above the low water mark in the Mississippi River.

Mr. Harrington: And it is mutually conceded and agreed that the question of the encroachments and the legal liability which may or may not result therefrom, is a matter involving a very substantial portion of the damages claimed by the Railroad Company.

Mr. Harrington: It is understood that the following stipulation shall be copied into the record by the reporter.

In order to clarify the record and particularly the argument in which certain concessions were made by the various parties, Pages 1170 to 1258*, inclusive, and Pages 1282 to 1294*, inclusive, it is hereby stipulated that all the concessions made by the parties hereto with reference to the segments of the Railroad claimed by the Government to be encroachments shall not be binding upon the parties if the offer of proof hereinafter set out on the part of the Government shall be admitted in evidence. It is further stipulated that the concessions herein made shall not be binding upon any of the parties hereto upon a new or retrial of this case or in any other case. In any new trial or retrial of this case each party may notwithstanding any and all concessions herein, offer all competent evidence involving the so-called encroachment segments as to the correct low water mark, the correct ordinary high water [fol. 155] mark, and accretion if any along said Railroad, the question as to whether or not such segments of the Railroad and Telegraph Companies are or are not located in a navigable water of the United States and if in such a navigable water, as to whether or not such segments or any portion thereof, are obstructions or a benefit to navigation or are in fact encroachments. It is hereby stipulated by and between the parties hereto that in lieu of the concessions contained in the aforesaid pages of the transcript the following stipulation is entered into and may be incorporated in the record herein as the expression of the actual intention of the parties herein.

It is agreed that this stipulation shall not deprive either of the parties from herein proving or disapproving that the waterways along the claimed encroachments are or are not in fact navigable waterways of the United States.

It is agreed that the Railroad Company is the riparian owner in the segments involved.

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*These references are to the pages of the transcript of the hearing where concessions were made by the parties during the course of argument.

It is agreed that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark.

The Government makes the following offer of proof:—

"The Government offers to prove that four segments of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and of the Western Union Telegraph Company, between Stations 4990 plus 86.5 to 4978 plus 86.5, a distance of 1200 feet between Stations 4968 plus 86.5 to 4948 plus 86.5, a distance of 2000 feet; between Stations 4936 to 4927, a distance of 900 feet; and between Stations 4807 to 4795, a distance of 1200 feet; are constructed on land which is located below ordinary high water mark and above low water mark. The Government further offers to prove that no Act of Congress exists consenting to the construction of the Railroad embankments at the above stated locations where the Government contends the Railroad embankments are constructed below the ordinary high water mark, although the Government concedes the embankments were constructed above low water mark, and that no authorization by, or approval of, such construction was secured from the Secretary of War or the United States Chief of Engineers other than is evidenced by Government Exhibits 69, 70 and 71. The Major Riche referred to in Government Exhibit 69 was the officer of the United States Engineers in charge of the section of the Mississippi River in which the area in question is located and that Mr. Rahme, referred to in Government Exhibit 71, was the District Engineer of the Railroad Company in charge of that part of the Railroad Company within this condemnation."

[fol. 156] That Railroad and Telegraph Companies concede that the Government possesses sufficient evidence to make it a question for jury determination as to whether the railroad was or was not in fact constructed at an elevation between low and ordinary high water mark elevations of the Mississippi River, but they do not concede that the waterway along or near the above mentioned 2000 feet and 900 feet segments respectively is a navigable waterway of the United States or one in which there is any practical

possibility of its being used as a highway by water for interstate or foreign commerce. The Railroad and Telegraph Companies also concede that their claim for damages within the limits of the aforesaid railroad stations referred to in the Government's offer of proof is a very substantial amount, being approximately one-fourth of their total claims.

The Railroad and Telegraph Companies, as well as the Trustees under the mortgages of the Railroad, object to such offer of proof upon the grounds that the fact which the Government proposes to prove is immaterial and upo the further ground that as to the 2000 foot segment between Railroad Stations 4968 plus 86.5 to 4948 plus 86.5 and the 900 foot segment between Railroad Stations 4936 and 4927 are both located along or near a waterway which is not a navigable waterway of the United States and is not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce.

The Court: The objection to the offer of proof contained in the foregoing stipulation is sustained and exception allowed.

Thereafter Government Exhibits 69, 70 and 71, which are referred to in the stipulation, were marked by the reporter and offered and admitted in evidence for use in connection with the offer of proof. Counsel for the condemnee stated that he made no objection on the ground that [fol. 157] the exhibits were photostatic copies of the originals. Exhibit No. 69 is as follows:

(Exhibit 69.)

Construction of Double Track
River Div.
Dec. 17, 1909.

Major C. S. Riche,
Corp. of Engineers, U. S. Army,
Rock Island, Ill.

Dear Sir:

This company expects to double track the River Division the coming season between the present terminus of our double track at Wabasha and terminus at Richmond.

There are a number of places where we wish to improve the alignment. At a few of these places between Minneiska and La Moille, we cut across the sloughs, as shown on the map which I send in duplicate under a separate cover. These changes do not interfere with the channel and are generally across the bays or sloughs.

We went over this work recently with Captain Thompson and Major Du Shane and they thought there would be no objection whatever on the part of the Government, but we would like to get your permission to go ahead with the work, as shown on the map by the lines colored red.

Yours truly,

M. D. RAHME,
Div. Engr.

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Exhibit No. 70 was the map dated November 9, 1909, showing proposed changes in alignment on the River Division of the C. M. & St. P. & P. Ry. Co. on west side of the Mississippi River from Minneiska to 3 miles east of Whitman and in vicinity of La Moille in Wabasha and Winona Counties, Minnesota, which was enclosed with Mr. Rhame's letter of December 17, 1909. (The original exhibit has been transmitted to the United States Circuit Court of Appeals for the Eighth Circuit by order of the District Court and is reproduced herein on a reduced scale).

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